Supreme Court, U.S.
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No. 03-933 DEC 23 2003

In The
Supreme Court of the United States

HON. SILA M. CALDERON, Governor of the Commonwealth of Puerto Rico, et al.,

Petitioners,

v.

ROBERTO NAVARRO AYALA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

On April 29, 2003 the district court re-appointed a Master pursuant to Fed.R.Civ.P 53 and empowered the same to engage in an ex-parte, off-the-record fact-finding investigation of the Commonwealth defendants' compliance with an order closing the underlying litigation. In this context, the questions presented are as follows:

A.

May a district court, without violating the due process clause, Fed.R.Civ.P. 53 and judicial canons, empower a Master to engage in a secretive, ex-parte, off-the-record fact-finding investigation of the Commonwealth defendants' compliance with a case-closing order, without notice to or participation of counsel for the Commonwealth defendants, and without opportunity to raise rights and privileges with respect to the investigation, such as objections concerning intrusion into state functions, due process violations, attorney-client relationship and deliberative process privileges.

B.

May a court of appeal fail to exercise supervisory mandamus under the All Writs Act or interlocutory jurisdiction pursuant to *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), where the harms caused by the Master's unrestricted, ex-parte and off-the-record fact-finding investigation upon the Commonwealth defendants' federalist interests, due process rights, attorney-client relationship and deliberative process privileges are severe, irreparable and will not be remedied upon an end of the

QUESTIONS PRESENTED – Continued

case appeal; and where denial of jurisdiction conflicts with the exercise of supervisory mandamus jurisdiction in similar circumstances by the Second, Fifth, Seventh, Ninth and Tenth Circuits.

LIST OF PARTIES

The underlying case is a civil class action under 42 U.S.C. § 1983 alleging unconstitutional conditions at the Psychiatric Hospital of the Commonwealth of Puerto Rico. The original complaint, filed in 1974, contains a rather ample statement of the defendants. At this time, said defendants and present petitioners are the Hon. Sila M. Calderón, Governor of the Commonwealth of Puerto Rico; Dr. John. Rullán, Secretary of the Department of Health and Acting Administrator of the Mental Health and Anti-Addiction Services Administration (MHAASA); Rafael García Alvarez, Director of the Commonwealth Psychiatric Hospital; Dr. Reinaldo Rodríguez Llauger, Medical Director of the Commonwealth Psychiatric Hospital; and their "agents, employees and/or successors in office."

The respondents are Roberto Navarro Ayala, represented by his mother María Ayala Rosado, on behalf of himself and all other similarly situated patients at the Psychiatric Hospital of the Commonwealth of Puerto Rico.

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The opinions below are: (a) the order of September 5, 2003, denying the petition for rehearing en banc of the Judgment issued on July 21, 2003, dismissing for lack of interlocutory or mandamus jurisdiction the appeals nos. 03-1884 and 03-1946. App. 3-7; and (b) the order of November 4, 2003, denying appeal no. 03-1998 for the same reasons expressed in the September 5, 2003 order dismissing appeals nos. 03-1884 and 03-1946. App. 1-2. None of the orders or judgment are published.

JURISDICTION

This application for a writ of certiorari to the First Circuit seeks review of two appellate judgments or orders, concerning three (3) interrelated or consolidated appeals to the First Circuit, appeals nos. 03-1884, 03-1946 and 03-1998.

The first order on review is the judgment of November 4, 2003, dismissing appeal no. 03-1998 for want of interlocutory jurisdiction. App. 1-2. The deadline for the filing of the application for writ of certiorari of this appeal extends until February 3, 2003, and the filing of this petition on this date, is well within the allowable 90-day period of Rule 13(1) of the Supreme Court Rules.

The second order on review is the order of September 5, 2003, on rehearing en banc, denying a petition for rehearing with suggestion for rehearing en banc of the Judgment of July 21, 2003, dismissing appeals nos. 03-1884 and 03-1946 for want of interlocutory jurisdiction. App. 3-4. On December 4, 2003, the Commonwealth petitioners applied for an extension of time until December 23, 2003 to file their application for a writ of certiorari. By order of December 8, 2003, this Court extended the

period for the filing of the application for writ of certiorari until December 23, 2003, and the filing of this application on this day is in conformity with said order.

This Supreme Court has jurisdiction to hear this petition for a writ of certiorari pursuant to the provisions of 28 U.S.C. § 1254(1) and Rule 13(1) of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.Const., Amend. V, provides:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

All Writs Act, 28 U.S.C. § 1651, provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Rule 53 of the Federal Rule of Civil Procedure. Masters.

(a) Appointment.

(1) Unless a statute provides otherwise, a court may appoint a master only to:

> (C) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.

(b) Order Appointing Master.

(1) Notice. The court must give the parties notice and an opportunity to be heard before

appointing a master. A party may suggest candidates for appointment.

(2) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(A) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53(c);

(B) the circumstances – if any – in which the master may communicate ex parte with the court or a party;

(C) the nature of the materials to be preserved and filed as the record of the master's activities;

(D) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations; and

(E) the basis, terms, and procedure for fixing the master's compensation under Rule 53(h).

(3) Entry of Order. The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification under 28 U.S.C. § 455 and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(4) Amendment. The order appointing a master may be amended at any time after notice to the parties, and an opportunity to be heard.

(c) Master's Authority. Unless the appointing order expressly directs otherwise, a master has

authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

(d) Evidentiary Hearings. Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

(e) Master's Orders. A master who makes an order must file the order and promptly serve a copy on each party. The clerk must enter the order on the docket.

(f) Master's Reports. A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

(g) Action on Master's Order, Report, or Recommendations.

(1) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(2) Time To Object or Move. A party may file objections to – or a motion to adopt or modify – the master's order, report, or recommendations no later than 20 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

(3) Fact Findings. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

(4) Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.

(5) Procedural Matters. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

STATEMENT OF THE CASE

A. Background

The underlying case is a civil class action filed in 1974 under 42 U.S.C. § 1983 brought by patients at the Psychiatric Hospital of the Commonwealth of Puerto Rico, under the aegis of the Department of Health, claiming unconstitutional provision of mental health services at the Hospital. See generally *Navarro-Ayala v. Hernández-Colón,* 951 F.2d 1325 (1st Cir. 1991) (*Navarro I*) (confirming class action but limiting scope of the action); *Navarro-Ayala v. Hernández-Colón,* 956 F.2d 348 (1st Cir. 1992) (*Navarro II*) (appointment of Master to investigate not final order); *Navarro-Ayala v. Hernández-Colón,* 3 F.3d 464 (1st Cir. 1993) (*Navarro III*) (reversing sanctions imposed by Master).

In the early 1970s, the Hospital was the equivalent of a medieval mental asylum, with severe overcrowding, deficient physical facilities, understaffed personnel and inadequate treatment. The 1974 action sought to redress these conditions, prompting the Commonwealth defendants in 1977 to convene to a comprehensive settlement stipulation aiming to modernize the Hospital according to contemporary standards of adequate medical care. *Navarro I*, 951 F.2d at 1327-1328.

In 1985, the district court, pursuant to Fed.R.Civ.P. 53, appointed Dr. David Helfeld as a Special Master to oversee implementation of the settlement agreement. See Order of Reference of 1985, App. 23-28. The Master opened an office with staff at the Hospital, oversaw the administration of the Hospital, and filed 40 voluminous reports recommending improvements at the Hospital. An original 2-year appointment became a 12-year tenure. See generally *Navarro I, II and III.*

In 1997, the court found that the Commonwealth defendants had achieved substantial compliance with the settlement stipulations and terminated the appointment of the Master. App. 14-20. In 1999, the Joint Commission for the Accreditation of Health Care Organizations (JCAHCO) crowned the Hospital's reform with the concession of accreditation, again renewed in 2002. As a result, on August 11, 2000, the parties filed a Joint Stipulation and Request for Order of Dismissal asserting compliance with the settlement decree, pledging to maintain JCAHCO accreditation, and agreeing to maintain a yearly budget of at least $18,929,000. App. 17-18.

In January 2001, Sila M. Calderón became Governor of the Commonwealth and named defendants Dr. John Rullán and Dr. Dalila Aguilú as Secretary of Health and

Administrator of the Mental Health and Anti-Addiction Services Administration (MHAASA), respectively. At their request, on December 13, 2001, the district court (Laffitte, J.) visited and inspected the conditions and operations of the Hospital and participated in the meeting of its Governing Board. Consequently, on January 28, 2002 the court dismissed the case, subject to continued observance of the court's order of March 9, 2000 and the joint stipulation and order of dismissal of August 11, 2000. See App. 14-20.

About a year later, however, claiming to act on several ex-parte "communications from various sources," the district court issued on March 12, 2003 an order for a status conference scheduled for March 18. App. 8-9. The purpose of the status conference was to determine: (1) whether the budget for the Hospital for the next fiscal year had been reduced from the Court-ordered amount of $18,929,000; (2) whether during the present and past fiscal years funds budgeted for the Hospital had been transferred to cover costs not related to the Hospital's operations; and (3) whether the alleged decision to close down the San Patricio Mental Health Center breached the court's requirement of pre and post Hospital support systems. Secretary of Health Rullán and other Commonwealth defendants appeared at the status conference and informed the court that the ex-parte rumors on which it was relying were incorrect, as the Hospital had been and would be fully funded in the amount required by the court order and that the San Patricio Center would not be closed.

B. The Opinions Below

Despite these reassurances, on April 29, 2003, the district court *sua sponte* reappointed Dr. Helfeld as a

Special Master, pursuant to the original order of reference of February 8, 1985. App. 10-13. Once again relying on ex-parte communications received via letters directly to the court, not shared with the Commonwealth defendants, the court commissioned the Master to "determine the veracity of [defendants] alleged non-compliance," and "to effectuate the investigation and to report to the Court his findings and recommendations with all deliberate speed." App. 12.

The day after this appointment, the Master initiated a roving ex-parte investigation of the Commonwealth defendants' compliance with the court's orders characterized by what the petitioners consider to be an unconstitutional modus operandi. This objectionable investigatory and fact-finding modality consists of the following: (a) personally interrogating ex-parte the Commonwealth defendants, agents and employees and requiring the production of documents without notice to and outside the presence of counsel; (b) prohibiting counsel for the Commonwealth defendants to be present at or be notified of any facet of the fact-finding investigation; (c) requesting the production of voluminous records without subpoena or without informing counsel of the request or identifying the documents required to be produced; (d) disallowing counsel for the Commonwealth defendants the opportunity to raise issues concerning relevance, rights or privileges; (e) failing to make or keep a formal evidentiary record of the interrogatories of the Commonwealth defendants, agents or employees; and (f) disallowing timely consultation between the Commonwealth defendants and their Department of Justice attorneys prior to co-opting commitments for joint work groups that invade Commonwealth administrative and public policy functions.

In this manner, the Master has interrogated and ordered the production of documents of all the petitioners, and a substantial number of their agents and employees, including without limitation the Commonwealth Secretary of Health, the Administrator of the MHAASA, the Director of the Psychiatric Hospital, the Medical Director of Psychiatric Hospital, the Hospital's Medical Faculty, the Hospital's Area Directors, the Director of the San Patricio Mental Health Center, the consultant for the Department of Justice counsel representing the Commonwealth defendants, their staff and many others identified or not in the Special Master's First and Second Reports. See App. 46-124.

The Commonwealth Department of Justice counsel for the Commonwealth defendants promptly and timely objected to this unrestricted, secretive, ex-parte fact-finding investigation. See Motion in Response to Court Order, of May 6, 2003. App. 125-128. The motion, after noting the hearsay nature of the communications to the court, sums up:

> The Court has authorized ex-parte investigations by the Special Master that do not adhere to basic principles of due process of law, such as notifying counsel of the proposed objects of the interview and allowing the presence of counsel for either plaintiffs or defendants. The departure from basic principles of law – such as the opportunity to examine the evidence that moves the Court to the reappointment of the Master, the opportunity to present contrary evidence, the opportunity to know beforehand of the Special Master's proposed interview agenda, the opportunity to have counsel present – is unbecoming of judicial fact-finding under our constitutional system. App. 127.

On May 6, 2003, the Master inclusively attempted to question counsel for the Commonwealth defendants. At the meeting, counsel Del Valle indicated to the Master that as legal representative for defendants he was not there for a factual interview but to argue the unconstitutionality of the fact-finding process and request a rectification of the same. As reported in his First Report, the Master rejected the arguments of law, claiming that constitutional due process principles were inapplicable to his investigation as Special Master. App. 54.

The Master's secretive, ex-parte and off-the-record fact-finding continued unabated. As a result, on May 22, 2003, the Commonwealth defendants filed their first notice of appeal, together with a Motion Submitting Affidavits and Notifying Appeal. App. 129-145.[1] The notice of appeal sought review of the April 29 order designating a Special Master to investigate ex-parte and report on the Rio Piedras Psychiatric Hospital, and from Dr. Helfeld's May 19 letter summons to various Commonwealth defendants to appear at the federal courthouse for interrogation, without notice to or presence of counsel.

Following said notice of appeal, on June 4 the Master presented his First Report, wherein the first order of business is lambasting the Commonwealth defendants'

[1] The motion notifying the appeal accompanied the affidavits of five (5) Commonwealth defendants: the MHAASA Administrator and its Deputy Administrator, the Hospital Director, the Hospital Medical Director and the Clinical Director of San Patricio Medical Health Center. In each of these affidavits, the Commonwealth defendants decried the lack of notice and absence of their counsel from the proceedings. In addition, the motion informed the court of the filing of an appeal and requested the stay of further proceedings by the Master pending the outcome of the appeal. App. 132-143.

counsel for obstructing the investigation by raising legal challenges to the same. App. 46-87. The Report confirms the repeated requests by Department of Justice counsel to be notified and be present during any fact-finding proceeding as a matter of due process rights. The Master once again rejected the application of due process restraints to his court-ordered fact-finding investigation, and asserted that "under the procedure which I planned to follow officials, employees and persons called to provide information would do so without the presence of counsel or anyone designated by counsel." App. 53.[2]

The Report goes on to narrate the various occasions during which Commonwealth counsel had challenged on due process grounds the Master's ex-parte investigation and had "urged that the investigation procedures being followed be reshaped to conform to what he claimed were constitutionally correct [procedures]." App. 55. The Report classified the due process challenges as "obstructionist action" aimed at preventing the completion of the court-ordered investigation and ended by recommending that the district court "order defendants and their legal representatives to cease and desist from obstructing the Special Masters' efforts to carry through to completion the court-ordered investigation." App. 85.

At a status conference of June 17, 2003, the Secretary of Health Rullán and other Commonwealth defendants informed the court of the establishment of a Task Force to

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[2] In the case of the MHAASA Administrator Dr. Aguilú, an exception was made at her request to allow her consultant, attorney Rita Rodríguez, to be present. The Master, however, omits mentioning that Rodríguez had served as his Deputy Monitor during the better part of his prior 12-year tenure as Special Master.

strengthen the Hospital; they also testified and submitted fiscal statements showing that the hearsay information on which the court was relying as to inadequate or diverted Hospital funding was incorrect.

C. Order of June 18, 2003 denying due process claims and denying stay of proceedings

By Order of June 18, 2003, the court determined that the May 22 appeal, which it termed a "dilatory tactic," did not divest the court of jurisdiction because the orders on appeal were interlocutory and non-final in nature. The court found that the Commonwealth's defendants' had "failed to make any specific objections to the findings and recommendations in Dr. Helfeld's unfinished report," despite the testimony of the Commonwealth defendants and the financial compliance data submitted to the contrary. The court then denied the Commonwealth's due process objections, denied the request for stay pending appeal, and gave free rein to the Master "*to conduct any investigation which he deems necessary* to ascertain if the Commonwealth is in compliance with all court Orders." App. 33-37.

Upon receipt, petitioners immediately appealed the June 18, 2003 order. See Amended Notice of Appeal of June 19, 2003. App. 152.

D. Judicial Minutes of June 23, 2003

On June 23, 2003, the district court issued Minutes of Proceeding stating:

> It should be noted that all the parties agreed that the Judge could engage in *ex-parte* meetings with all the parties, so as to inquire into the efforts being made to comply with previous court

> orders. Also, the parties agreed to be interviewed *ex-parte* by Special Master Dr. Helfeld. Dr. Helfeld expressed his intention to continue his investigation by interviewing [MHAASA] personnel in relation to the budget and the denial of certain requisitions. App. 39.

Immediately upon receiving said Minutes, the Commonwealth filed a Motion disputing the assertion by the district court that the defendants had consented to ex-parte proceedings by the court or the Special Master. App. 154-157. In order to clarify the extent of any alleged acquiescence to ex-parte proceedings, the Commonwealth filed a motion pointing to the lack of formal record of the status conference. The motion noted that at the status conference, the Commonwealth defendants had testified and presented documentary evidence refuting the findings in the Master's Report and noted: "To our best recollection, it was not that the Commonwealth defendants did not make any specific objections to the findings and recommendations of Dr. Helfeld's unfinished report, but that the Court did not validate the testimony and evidence as truthful or reliable." App. 155. On said date, the Commonwealth defendants proceeded to file a second amended notice of appeal from the portion of the Minutes that authorized the ex-parte proceedings by either the district court or the Special Master. App. 158.

E. The Court of Appeals Judgment and Orders

On July 3, 2003, the petitioners filed before the Court of Appeals a motion to stay the district court order, a petition for mandamus with a brief on the merits, a motion for permission to consolidate the petition for mandamus with the brief on the merits, and a request for expedited consideration of the petition for mandamus and the merits

of the appeal. A new Emergency Motion for Stay was filed on July 8, 2003 to attempt to stop the Master from engaging in the co-administrative functions with respect to the Psychiatric Hospital. The Emergency motion was denied on the same date.

By Judgment of July 21, 2003, the First Circuit denied appeals in nos. 03-1884 and 03-1946, on the grounds that the orders on appeal were not final under 28 U.S.C. § 1291 as the district court has not yet made up its mind nor ordered substantive relief. The Circuit found that under the collateral order doctrine, an interlocutory order must involve a right incapable of vindication on appeal from final judgment and this criteria was not met because defendants were free to raise the ex-parte nature of the investigation as a ground for rejecting the Master's report, or affording it less deference, and could renew their appellate arguments at such time as a remedy was finally ordered. App. 5-7.

The court also rejected the exercise of mandamus jurisdiction since said relief is limited to "those rare cases in which the issuance (or nonissuance) of an order presents a question anent the limits of judicial power, poses some special risk of irreparable harm to the appellant, and is palpably erroneous." (Citations omitted). *Id.* The court did not find that the case posed a special risk of irreparable harm following the same reasoning articulated in rejecting application of the collateral order doctrine – namely, that the ex parte nature of the investigation might be effectively challenged in a direct appeal. On these grounds, the Circuit dismissed the appeal for lack of jurisdiction and denied the petition for a writ of mandamus.

On August 5, 2003, the Commonwealth defendants filed a petition for rehearing en banc. By Order of September 5, 2003, the petition for rehearing en banc was summarily denied. App. 3-4. This dismissal is part of this application for a writ of certiorari.

Although petitioners requested and were granted the consolidation of all cases on appeal, for some reason the second amended notice of appeal filed on July 23, 2003 (no. 03-1998) was treated as a distinct appeal from the appeals filed on May 22 (no. 03-1884) and June 19 (no. 03-1946). On November 4, 2003, appeal no. 03-1998 was denied for the same reasons expressed in the September 5, 2003 order dismissing appeals nos. 03-1884 and 03-1946. App. 1-2.

F. Subsequent Master's Conduct Relevant to Petition

Following the appeal, the Special Master has not only continued his ex-parte investigations, but has composed a Master's Group of mental health professionals, which is meeting regularly with personnel from the Department of Health to, according to the Master, jointly restore the Hospital to its "former level of compliance with federal and Puerto Rico standards of acceptable mental health services" and "focus on the public/private issue of how best to implement public health policy."[3] The Master has now expanded his commission to cover the following:

> Finally there is an issue which should be faced: how much of mental services should be provided

[3] Letter of July 24, 2003 of the Master included at pages 165-166 of Appendix to Brief and Petition for Mandamus of July 1, 2003 before the First Circuit.

> by MBHO's and how much by public institutions? In short, how best to implement public policy, both federal and Puerto Rican, in the field of mental health? *Id.*

The Master does not allow any counsel for the parties to be present in the joint meetings of his Group with the Department of Health personnel. The Secretary of Health and other governmental defendants are under the apprehension that they may be charged with "obstruction" should they not accede to the Special Master contemplated joint sessions. In sum, Dr. Helfeld is now embarked, not merely in measuring compliance, but in an attempt to unduly influence if not indirectly participate in the administration of the Hospital and reshape federal and Commonwealth public policy concerning mental health, with the express consent of the district court, and shielded from any effective legal challenge by the First Circuit dismissal of the Commonwealth defendants' appeals and petition for mandamus.

On October 17, 2003, the Special Master filed his Second Report. App. 88-124. On November 13, 2003, the Commonwealth defendants objected to the same, once again on due process grounds, pointing to its secretive, ex-parte, off-the-record and privilege-infringing fact finding. App. 167-179.

On November 14, 2003, the Special Master took the unprecedented step of recommending the disbarment of PRDOJ counsel for the Commonwealth defendants for obstructing the Master's investigation by continuing to present due process challenges to the Master's investigation. App. 180-221. According to the admissions of the Master in his Motion for Sanctions, he relied on the ex-parte interrogatories of unidentified informants that participated in a meeting held by the Secretary of Health and his counsel to discuss the Commonwealth defendants' response to the Second Report. The Master's secret informants disclosed to

him the contents of attorney-client conversations and governmental public policy deliberations that took place during the meeting. On the basis of said hearsay information provided off-the-record by unidentified informants the Master determined that counsel for the Commonwealth had breached ethical and professional standards by his "failure to counsel [Commonwealth] defendants against engaging in obstructionist conduct to the detriment of the Special Master's court-assigned investigation." App. 181. The Master, therefore, recommended the imposition of strong dissuasive sanctions, including disbarment from the legal profession. App. 217-221. While the district court did not act upon the disbarment request, it did reprimand counsel for failure to advocate within "ethical boundaries and in good faith" and warned that further "personal attacks" on the Special Master may result in disqualification and further disciplinary actions of an unidentified nature. App. 44-45.

The end result is that for no legitimate reason, a chill on advocacy has been attached to the unbounded investigatory power of the Special Master such that the Commonwealth defendants and their counsel have been effectively restrained in raising constitutional legal challenges, engaging in attorney-client counseling and partaking in governmental deliberative processes with respect to the Commonwealth's public policy and the defense in the action.

REASONS FOR GRANTING THE PETITION

The substantive question presented by this application is of cardinal national importance under our constitutional system: whether a Master properly appointed under Rule 53 may – consistent with the due process clause – nonetheless be empowered to engage in an unrestricted,

unchecked, ex-parte, off-the-record fact-finding investigation of the Commonwealth defendants and property, without notice to or participation of their counsel, and without opportunity to raise rights and privileges concerning the information being sought, such as those concerning federalist concerns, due process challenges, attorney-client relationship and deliberative process privileges.

A Master, so empowered, can meet – as he has done here – with any Commonwealth defendant or agent, from the Governor down, and interrogate them at will with respect to any aspect arguably related to the underlying action, including governmental deliberative public policy matters and confidential matters privileged by the attorney–client relationship. Under the present judicial authority, the Master acts under the premise that no due process safeguards attach to his court-ordered investigation and fact-findings, expressly dispensing with notice to counsel of the person to be interrogated and/or the documents to be produced, and banning the presence of counsel in any part of his fact-finding investigation or proceedings.

This conduct is compounded by the rather chilling notion that legitimate due process challenges to this judicial state of affairs and attorney-client counseling are interpreted as obstructions to the investigation that warrant disbarment from the legal profession of the Commonwealth defendants' counsel. See App. 217-221. As a result of this Jacobin set-up, the Commonwealth defendants have been intimidated or coerced to "consenting" to participate in a joint Master-Department of Health working group that enjoys inordinate input and/or participation in the administration of the Commonwealth Psychiatric Hospital and the Commonwealth's formulation of its public policy regarding mental health, in contravention of

the federalist principles that apply to judicial equitable relief.

This application also presents the question of whether the First Circuit's refusal to exercise interlocutory or mandamus jurisdiction to review this empowerment of the Master under Rule 53 is inconsistent with its statutory duty under the All Writs Act and with the collateral order doctrine, particularly with respect to the underlying usurpation of judicial power and the trampling of the Commonwealth defendants' privileges.

The First Circuit declined to exercise interlocutory appeal under the collateral order doctrine or supervisory mandamus on the grounds that the ex-parte nature of the investigation may be effectively challenged upon an end of the case appeal. This rationale misweighs the significant harm that the present investigatory process causes to the Commonwealth defendants, regardless of the ultimate remedy in the case. Here, the violations to the petitioners' federalist interests, due process rights, deliberative process privileges and attorney-client relationship, exacerbated by the chilling effect upon the defense of the petitioners' interests caused by the threatened disbarment of their counsel, are grave procedural harms in themselves that cannot be remedied upon the end of the case appeal. The Constitution does not countenance this type of inquisition-like investigation that the judicial system is presently allowing under the rubric of Rule 53.

The Circuit refusal to review these issues interlocutory is inconsistent with this exercise of supervisory mandamus endorsed in *La Buy v. Howes Leather Co.*, 352 U.S. 249, 259-60 (1957), when "necessary to the proper judicial administration in the federal system." Furthermore, it conflicts with other appellate circuits that have

exercised interlocutory and/or mandamus jurisdiction to safeguard the protection of assailed privileges. For these reasons, petitioners respectfully submit that these questions present such issues both of national importance and inconsistent appellate practice, that a writ of certiorari to the Court of Appeals for the First Circuit is justified to provide uniformity and national guidance in the guardianship of our constitutional values.

A. Neither The Due Process Clause Nor Fed.R.Civ.P. 53 Countenance Unchecked, Ex-Parte, Off-The-Record Fact-Finding Investigation By A Master

While the due process clause does not expressly provide for the assistance of counsel in civil proceedings, said assistance seems to be implied in any judicial investigation, such as an institutional reform litigation under § 1983, where the state defendants may be the subject of contempt or judicial sanctions. In general terms, the prohibition against ex parte proceedings by judicial officers is deeply rooted in the constitutional right to due process and a fair trial. See *Home Box Office v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (secret proceedings are inconsistent with fundamental notions of fairness implicit in due process and with the ideal of reasoned decision making). When a party's counsel "is under practical restraints in the making of objections and in the tactical handling of his case which would not obtain in a cause of action being tried in a court of law, scrupulous observance of [established due process safeguards] is clearly of particular importance." *Vitarelli v. Seaton*, 359 U.S. 535, 540 (1959).

In those limited instances where ex parte communications have been deemed proper, controls have been placed to ensure that, except in unusual circumstances, the parties have been notified of the proceedings. The classic ex-parte proceeding is the temporary restraining order, which will be granted without written or oral notice to the adverse party only if immediate and irreparable harm will result to the applicant before the adverse party can be heard in opposition. See Fed.R.Civ.P. 65(b).

Rule 53 regulates the appointment and powers of a special master consonant with due process principles. Under the amendment to Rule 53 of December 1, 2003, Rule 53(c) contemplates that the powers of the Master shall be consonant with the requirements of due process insofar as it contemplates that its fact-finding proceedings will be pursuant to trial proceedings " . . . on issues to be decided by the court without a jury and present exceptional circumstances." Rule 53(a)(1)(B). The court may also appoint a master to address post-trial matters that cannot be addressed effectively and timely by an available district court judge, but again subject to the requirement of an evidentiary hearing of Rule 53(d). Rule 53(c) grants the master authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties, but arguably within the strictures of the Federal Rules of Civil procedure.

Ultimately, due process safeguards apply to a Master's investigatory proceedings because the master is a surrogate of the court and is deemed to be assuming "the duties and obligations of a judicial officer." *In re Gilbert,* 276 U.S. 6, 9 (1928) (master's appointment means assuming the duties and obligations of a judicial officer); *York Int'l Bldg.,*

Inc. v. Chaney, 527 F.2d 1061, 1068 (9th Cir. 1975) (masters are "officers of the court").[4]

Petitioners note that the Master's conduct of his investigation abuses the powers granted under Rule 53 by intruding into Commonwealth functions of administrating the Hospital and by the establishment of a joint work engaged in administrative inputs and determining "how best to implement public policy, both federal and Puerto Rican, in the field of mental health." *Id.* Here the Master has gone far beyond his original commission of superintending compliance with the court's orders, and has become an advocate for the plaintiffs' class and a roving federal court. As noted in *Ruiz v. Estelle*, 679 F.2d 1115, 1161-62 (5th Cir. 1982) and *Cobell v. Norton*, 334 F.2d 1128 (D.C. Cir. 2003), the self-assumed power "is not permissible under our adversarial system of justice and our constitutional system of separated powers." 334 F.3d at 1143. "Federalist system" can substitute for "separated powers" and the logic and result is the same.[5]

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[4] The ABA Code of Judicial Conduct for United States Judges, approved by the Judicial Conference of the United States, provides that "[a]nyone . . . who is an officer of a judicial system performing judicial functions, including an officer such as a . . . special master . . . is a judge for the purpose of this Code." The Code further bars ex-parte contacts by judicial officers; "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties." *See* Code Of Judicial Conduct For United States Judges (1989); *see also* 28 U.S.C. § 455(a); *Jenkins v. Sterlacci*, 849 F.2d 627, 630 (D.C. Cir. 1988) (Masters held to same ethical standards as Article III judges).

[5] The Supreme Court has emphasized that "although the 'remedial powers of an equity court must be adequate to the task, . . . they are not unlimited,'" *Whitcomb v. Chavis,* 403 U.S. 124, 161 (1971). "One of the most important considerations governing the exercise of equitable

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This Court has not directly confronted the question of whether due process and Rule 53 countenance this type of unrestricted, ex-parte, off-the-record proceeding. While there are a handful of cases where the district courts have allowed masters certain leeway in the conduct of ex-parte proceedings, none of these cases have confronted the issue directly.[6] The only direct authority is *Ruiz, supra*, 679 F.2d at 1162-63, where the court of appeals determined that an order appointing special master to supervise implementation of and compliance with the district court's decree was too sweeping. The Circuit determined that insofar as the order permitted the master to submit to the district court reports based upon his own observations and investigations in the absence of a formal hearing before him, that provision not only transcended the powers traditionally given masters by the courts of equity, but also denied the parties due process of law. See also *Cobell v. Norton*, *supra*.

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power is a proper respect for the integrity and function of local government institutions." *Missouri v. Jenkins,* 495 U.S. 33 (1990). In enforcing a consent decree, a district court must remain "aware of . . . the need to strike a proper balance between the integrity of the Consent Decree and the principles of federalism." *Duran v. Elrod,* 713 F.2d 292, 297 (7th Cir.), *cert. denied,* 465 U.S. 1108 (1983).

[6] See e.g. *Alberti v. Klevenhagen*, 660 F.Supp. 60, 611 (S.D. Tex. 1987) (granting power to conduct confidential interviews but warning that Master is not "to intervene in daily jail operations" and "not to function as inmate advocates, nor . . . to be a roving federal district court."); *NORMAL v. Mullen*, 828 F.2d 536, 539 (9th Cir. 1987) (allowing confidential interviews with "any person associated with the organization").

B. The First Circuit's Refusal To Exercise Interlocutory Or Mandamus Jurisdiction To Review The Master's Empowerment Of The Master Under Rule 53 Is Inconsistent With The Statutory Jurisdiction Granted By The All Writs Act, With The Collateral Order Doctrine And Conflicts With Other Appellate Courts Such That An Application For A Writ Is Proper

The collateral order exception to the finality rule recognizes that there may be situations, distinguishable from the ultimate merits of the action, that may require interlocutory review because they are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949); *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 103 (1983).

In addition, the All Writs Act, 28 U.S.C. § 1651, provides for supervisory mandamus jurisdiction in "those rare cases in which the issuance (or nonissuance) of an order presents a question anent the limits of judicial power, poses some special risk of irreparable harm to the appellant, and is palpably erroneous," *United States v. Horn,* 29 F.3d 754, 769 (1st Cir. 1994).

In its judgment, the First Circuit dismissed the appeal and mandamus on the grounds that the orders on appeal are not final because the district court has not ordered any substantive relief based on the Master's investigation; and that the Commonwealth defendants' suffer no irreparable harm as they can eventually raise, either before the district court or in a proper appeal, any due process

objections to the ex-parte nature of the Master's report upon its presentation for judicial action.

This reasoning misconceives the nature of the Commonwealth's legal challenge in this case. Unlike *Navarro II*, on which the First Circuit relied, the Commonwealth defendants here do not question the power of the district court to appoint a Master; the authority of this Master to investigate and report on compliance; appellants' opportunity to challenge the Master's report in its day; nor the right to question the substantive relief that the court may eventually order as a result of the report. The constitutional due process injury which grounds the appellants' challenge is entirely circumscribed to harm done by the investigatory and co-administrative process itself, not to any possible substantive outcome of a Master's Report.

Specifically, the Commonwealth defendants assert that it is a violation of the constitutional due process clause, Fed.R.Civ.P. 53 and judicial canons for a district court to empower a Master to engage in a fact-finding process that allows him to interrogate and compel production of documents of the Commonwealth defendant, agents and employees, ex-parte, without notice to, knowledge of or participation of counsel, without opportunity to raise legal objections; and to otherwise exceed any legitimate compliance investigation by partaking in the co-administration of the Psychiatric Hospital. Petitioners respectfully contend that the injuries inflicted on the Commonwealth defendants' constitutional rights and statutory privileges by the interventions and intrusions of this process are so incisive of themselves that they cannot be balmed by eventual review on direct appeal.

As developed before, the weight of the scarce legal precedent is that due process safeguards of the Constitution, the language of Rule 53, and the ABA Code of Judicial Conduct prohibit ex-parte investigations by judicial officers. See *Ruiz v. Estelle,* 679 F.2d 1115, 1162-63 (5th Cir. 1982) (ex-parte contacts denied parties due process of law).

An investigation of the Commonwealth defendants, their agents and employees, without notice to counsel or opportunity to raise legal challenges, may result in the outright evisceration of rights and privileges protected under the Constitution and federal rules of evidence and civil procedure. Specifically, under his present empowerment, the Master is granted unencumbered authority to interrogate the Commonwealth defendants, agents and employees, and to compel the production of documents that may contain privileged information, all without notice to or knowledge of counsel. These broad investigative powers allow the Master to delve into material that is privileged, result in greater intrusions into an institution's daily operations than required by federalist values, and potentially expose the defendants to further liability based upon impermissibly obtained information.[7]

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[7] Under Fed.R.Civ.P. 26(b)(1) material is discoverable only if it is "reasonably calculated to lead to the discovery of admissible evidence" and not privileged. Said privileged information is not discoverable, unless specific conditions are met. See Fed.R.Civ.P. 26(b)(3). After trial, when the threat of a contempt sanction is the primary means of coercing compliance with the decree, granting the special master wide ex-parte investigatory authority creates the possibility that special masters will search beyond normally permissible limits and invites special masters to originate new, incidental charges. Along with broad powers to conduct ex parte interviews, special masters would enjoy free

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The First Circuit decision, insofar as it fails to exercise interlocutory or mandamus jurisdiction to consider or protect the inroads into the Commonwealth defendants' attorney-client and deliberative process privileges conflicts with the Second, Fifth, Seventh, Ninth and Tenth Circuits, which provide mandamus jurisdiction to review harms to privileges because end-of-the-case review would render the remedy "worthless." See *In re Von Bulow,* 828 F.2d 94 (2d Cir. 1987) (compliance with discovery order against claim of privilege destroys right sought to be protected); *In re Burlington Northern, Inc.,* 822 F.2d 518 (5th Cir. 1987); *cert. denied,* 484 U.S. 1007 (1988) (mandamus appropriate to review attorney-client and attorney work product claims); *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1490 (9th Cir. 1989) (mandamus available as parties will suffer irreparable harm if otherwise forced to disclose privileged information); *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1490 (9th Cir. 1989) (absent mandamus, privilege claim will be rendered worthless); *Barclaysamerican Corp. v. Kane*, 746 F.2d 653 (10th Cir. 1984).

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rein over defendant institutions and their officers. See *Arthur Miller Murray, Inc. v. Oliver*, 364 F.2d 28, 34 (8th Cir. 1966) (asserting that judges should not "engage in a prospecting quest for other evidence . . . add to a record, nor appoint a master to make such a discovery pursuit for him"); *Young v. Pierce*, 822 F.2d 1368, 1375 (5th Cir. 1987) (recommending that district court modify order of reference to give defendant protections coextensive with Federal Rules of Civil Procedure); *Ruiz v. Estelle*, 679 F.2d 1115, 1162-63 (finding express constraint required to bar special master's unlimited access to defendant prison since remedial process should not be converted into surrogate forum for new civil rights actions), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983).

As the Seventh Circuit stated in *Harper & Row Publishers, Inc. v. Decker,* 423 F.2d 487 (7th Cir. 1970), *aff'd,* 400 U.S. 348 (1971): "[B]ecause maintenance of the attorney-client privilege up to its proper limits has substantial importance to the administration of justice, and because an appeal after disclosure of the privileged communication is an inadequate remedy, the extraordinary remedy of mandamus is appropriate." *Id.* at 492. The same logic, augmented by federalist concerns of undue intrusion into the administration functions of the Commonwealth, applies to the Commonwealth defendants' deliberative process privilege. See *Hinckley v. United States*, 140 F.3d 277, 284-85 (D.C. Cir. 1998) (privilege encompasses communications and material that are pre-decisional and deliberative); *Morgan v. United States*, 304 U.S. 1, 18 (1938) (mental deliberative processes of governmental officials prior to actions are privileged); *Cobell, supra*, 334 F.3d at 1142-43 (the D.C. Circuit noted that the Monitor there had exceeded the limits of the role that a court may permissibly give its agent when the Monitor there "was charged with an investigative, quasi-inquisitorial, quasi-prosecutorial role that is unknown to our adversarial legal system. . . .").

In the present case, these due process concerns have already become a reality. The Master's ex-parte proceedings do not allow the appellants to know or challenge the contents and reach of the interrogation of persons and the production of documents; so there is little formal way of knowing the full extent of the infringement upon deliberative privileges, attorney work-product or attorney-client relationships, among others. The record does reflect, nonetheless, that the Master has infiltrated with Trojan Horses the meeting of the Secretary of Health and counsel for the Commonwealth Department of Justice to discuss

the official response to the Master's Report. The Master has employed these unidentified "informants" (his own word) to relay to him the contents of the attorney-client relationship and the Commonwealth's deliberative process communications, and has used this hearsay, off-the-record information to seek the disbarment of the Commonwealth defendants' counsel in the underlying action. Unless due process safeguards are incorporated at this procedural stage of the investigation, so that counsel may partake of the process at least to be able to identify potential disclosure of privileged information and assert the corresponding defense, end-of-the-case remedies will be futile.

Petitioners submit that this case is an offspring of the seminal case for supervisory mandamus, *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). There, the Supreme Court, on a request for mandamus, reversed the referral to a Master pursuant to Rule 53 insofar as he exceeded his proper authority. In so doing the Court relied on its supervisory power to oversee the administration of the judicial system in the interest of justice. According to the Court: "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to the proper judicial administration in the federal system." *Id.*, 352 U.S. at 259-60. As in *La Buy*, the petitioners contend that the Court of Appeals did not exercise its supervisory control of the lower court to ensure that the powers granted to the Master comported to the requirements of the due process clause, Rule 53 and the canons of judicial conduct. By failing to exercise supervisory control over the district court, the Court of Appeals departed from *La Buy* and raised a conflict between Circuits with respect to the use of supervisory mandamus in the context of threatened privileges.

CONCLUSION

For the foregoing reasons, petitioners submit that the scope of the Master empowerment under the due process clause, Rule 53 and the judicial canons is a question of cardinal importance to the functioning of the judicial system and our constitutional values, and the existence of a conflict of circuits as to the appropriateness of interlocutory and/or mandamus jurisdiction in these circumstances requires clarification and uniformity, such that an application for a writ of certiorari to the First Circuit is warranted on the facts of this case.

Respectfully submitted, in San Juan, Puerto Rico for Washington, D.C., this December 23, 2003.

ANABELLE RODRIGUEZ
Secretary of Justice

IVONNE PALERM CRUZ
Deputy Secretary for Litigation

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For Petitioners

APPENDIX

First Circuit Judgment of November 4, 2003.....App. 1

First Circuit Order of September 5, 2003 .....App. 3

First Circuit Judgment of July 21, 2003 .....App. 5

District Court Order of March 12, 2002 .....App. 8

District Court Order of April 29, 2003 .....App. 10

a. Order of January 28, 2002 .....App. 14

b. Order of March 9, 2000 .....App. 21

c. Order of February 8, 1985 (Order of Reference).....App. 23

Special Master's Letter of May 19, 2003 .....App. 29

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Reply to Responses of the Plaintiffs and the Master of July 14, 2003 ..... App. 160

Motion Submitting Objections to Second Report, November 3, 2003 ..... App. 167

Special Master's Motion Requesting the Court Sanction Defendants' Counsel of November 14, 2003 ..... App. 180

Opposition to Special Master's Request for Sanctions of November 17, 2003 ..... App. 222

MANDATE

United States Court of Appeals

For the First Circuit

No. 03-1998

ROBERTO NAVARRO-AYALA, represented by his mother Maria Ayala Rosado, on behalf of himself and all others similiarly [sic] situated,

Plaintiff, Appellee,

v.

HON. SILA M. CALDERON, Governor of the Commonwealth of Puerto Rico, ET AL.,

Defendants, Appellants.

Before

Torruella, Selya and Lipez,
Circuit Judges.

JUDGMENT

Entered: November 4, 2003

Upon review of appellants' response to our show cause order and the record, we conclude that this appeal presents no new issue not encompassed in appellants' earlier appeal, No. 03-1884, and that it should be dismissed for lack of jurisdiction for the same reason that we dismissed appeal No. 03-1884.

By the Court:

Richard Cushing Donovan, Clerk

By: MARK R. SYSKA
Chief Deputy Clerk

[cc: Ms. Bird-Lopez, Mr. Garcia-Gutierrez, Mr. Rodriguez Rivera, Mr. Helfeld and Mr. Del Valle Cruz.]

United States Court of Appeals
For the First Circuit

No. 03-1884

ROBERT NAVARRO-AYALA,

Plaintiff, Appellee,

v.

HON. SILA M. CALDERON, ET AL.,

Defendants, Appellants.

No. 03-1946

SILA M. CALDERON, ET AL.,

Petitioners.

Before

Boudin, Chief Judge
Torruella, Selya, Lynch, Lipez and Howard,
Circuit Judges.

Order of Court

(Filed Sep. 11, 2003)

Entered: September 5, 2003

The petition for rehearing having been denied by the panel of judges who decided the consolidated appeal and mandamus petition and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that either the appeal or mandamus petition be heard en banc, it is

ordered that the petition for rehearing and petition for rehearing en banc be *denied*.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk.

[CC: Ms. Bird-Lopez, Messrs. Del Valle Cruz, Garcia Gutierrez, Rodriguez Rivera and Rodriguez Banchs]

MANDATE

United States Court of Appeals

For the First Circuit

No. 03-1884

ROBERT NAVARRO-AYALA,

Plaintiff, Appellee,

v.

HON. SILA M. CALDERON, ET AL.,

Defendants, Appellants.

No. 03-1946

SILA M. CALDERON, ET AL.,

Petitioners.

Before

Torruella, Selya, and Lipez,
Circuit Judges.

JUDGMENT

Entered: July 21, 2003

Defendants-appellants, various officials of the Commonwealth of Puerto Rico, have appealed from an order (or orders) of the district court authorizing *ex parte* investigation by a Special Master into defendants' compliance with a joint stipulation. This court issued a show cause order questioning our jurisdiction on the ground that there

does not appear to be an appealable final order. Defendants have responded by premising appellate jurisdiction on the collateral order doctrine under *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In the alternative, defendants argue that this court should exercise mandamus jurisdiction. Defendants seek both expedited review and a stay of the investigation pending our disposition.

We conclude that we lack appellate jurisdiction for some of the same reasons that we rejected defendants' appeal from a 1991 order requiring various investigations by the Master. *See Navarro-Ayala* v. *Hernandez-Colon*, 956 F.2d 348, 351 (1st Cir. 1992). The order at issue is not final under 28 U.S.C. § 1291 because the district court has not yet made up its mind much less ordered substantive relief. *See id.* To be appealable under the collateral order doctrine, an interlocutory order must involve a "right incapable of vindication on appeal from final judgment." *Id.* at 350 (citation omitted). This condition does not obtain here because defendants are free to raise the *ex parte* nature of the investigation as a ground for rejecting the Master's report, or affording it less deference, and may renew their arguments before this court at such time as a remedy were ordered.

We also conclude that this is not a suitable case for the exercise of mandamus jurisdiction. We have limited the availability of mandamus relief to "those rare cases in which the issuance (or nonissuance) of an order presents a question anent the limits of judicial power, poses some special risk of irreparable harm to the appellant, and is palpably erroneous." *United States* v. *Horn*, 29 F.3d 754, 769 (1st Cir. 1994). For the reasons articulated in rejecting application of the collateral order doctrine – namely, that the *ex parte* nature of the investigation may be effectively

challenged in a direct appeal – we do not think that this case poses a special risk of irreparable harm.

For the foregoing reasons, we *dismiss* the appeal for lack of jurisdiction and *deny* the petition for a writ of mandamus. Our disposition moots the motions for a stay and expedited review.

By the Court:

RICHARD CUSHING DONOVAN
Richard Cushing Donovan, Clerk.

[certified copy: Frances DeMoran, Clerk]
[c: Carlos V. Garcia Gutierrez, Esq., Alejandra Bird-Lopez, Esq., Manuel Antonio Rodriguez Banchs, Esq., Rafael Enrique Rodriguez Rivera, Esq. and Carlos A. Del Valle Cruz, Esq.]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO-AYALA, et al. Plaintiffs v. GOVERNOR OF PUERTO RICO, et al Defendants	Civil No. 74-1301(HL)

ORDER

I. Re: Compliance with the Court's Order of January 28, 2002

In recent days the Court has received communications from various sources alleging the following: (1) that the budget for the Río Piedras Hospital for the forthcoming fiscal year has been reduced from the $18,929,000.00 which is required by the Court's Order of January 28, 2002; (2) that during the present and past fiscal years funds budgeted for the Hospital have been transferred to cover costs not related to the Hospital's operations, contrary to the Order's instructions; and (3) that the decision to close down the San Patricio Mental Health Care is in violation of the Court's finding that "pre-and-post-Hospital support systems are essential to keep and maintain the Río Piedras Psychiatric Hospital de-institutionalized and constitutionally healthy".

II. Notice of a Status Conference: March 18, 2003, at 4:30 p.m.

This Court is obliged to verify whether the alleged violations of the January 28, 2002 Order are truthful. The verification process will begin with a status conference to be held in the Court's chambers, **March 18, 2003 at 4:30 p.m.** The following government officials are cited to appear: Dr. Johnny Rullán, Secretary of Health of Puerto Rico and Dr. Dalila Aguilú, Administrator of ASSMCA.

The Clerk shall notify Dr. David M. Helfeld, Dr. Johnny Rullán, and Dr. Dalila Aguilú with copy of this order forthwith.

IT IS SO ORDERED.

San Juan, Puerto Rico, March 12, 2003.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief U.S. District Judge

EXHIBIT D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO-AYALA, et al Plaintiffs v. GOVERNOR OF PUERTO RICO, et al Defendants	Civil No. 74-1301 (HL)

ORDER

(Filed Apr. 29, 2003)

I.

Re: Compliance with the Court's Order of January 28, 2002

On March 12, 2003, the Court ordered that a status conference be held on March 18, 2003, to determine whether defendants were in compliance with the Order of January 28, 2002, to wit: whether the Rio Piedras Psychiatric Hospital had been assigned the required budget of $18,929.00 [sic] for the forthcoming fiscal year and whether the San Patricio Mental Health Center was to be shut down. In the March 18 status conference, defendants assured the Court that there would be compliance with the Hospital's assigned budget and that the San Patricio facilities would not be closed or privatized. This was confirmed in the Informative Motion of defendants filed with the Court on April 12, 2003.

II.

The Court's Continuing Concern with Defendant's Compliance with the Order of January 28, 2003

Accompanying the defendant's April 12, 2003 Informative Motion is the draft of an agreement between Behavioral Health Care Partners (BHP) and ASSMCA which, among other dispositions, would assign to BHP a maximum of thirty beds in the Rio Piedras Psychiatric Hospital and the payment to the Hospital of $0.60 (sixty cents) for each insured person in the regions contracted. The draft agreement states that it is not to go into effect until reviewed and approved by the Court. Nonetheless, the Court has received information which, if true, is to the effect that the agreement has been signed and is presently operative. The Court is concerned about the impact of BHP's relations with, and intervention in, the functioning of the Psychiatric Hospital and its capacity to comply with the January 28, 2003 Order. The Court's concern is heightened by other alleged problems of non-compliance which have been brought to its attention.

The Court's concern is even greater with respect to compliance by the San Patricio Mental Health Center. A document has been received, prepared by mental health professionals, employees of the Center, which alleges a series of deficiencies in services to patients, as a consequence of the implementation of BHP's policies and procedures. The alleged deficiencies are incompatible with compliance. As in the case of the allegations concerning BHP's relations with the Psychiatric Hospital, the Court is obliged to determine their veracity and, if true, the remedial action which would be appropriate.

III.

Reappointment of Dr. David M. Helfed as Special Master

The Court has decided that to determine the veracity of alleged non-compliance by the Psychiatric Hospital and the San Patricio Mental Health Center, it is essential that an investigation be carried out under its auspices. To that end, the Court herewith reappoints Dr. David M. Helfeld as Special Master to effectuate the investigation and to report to the Court his findings and recommendations with all deliberate speed. His authority to carry out the investigation is defined in the Court's original order appointing him Special Master, dated February 8, 1985, which is herewith incorporated in the present order. His compensation and that of the professional assistance he contracts shall be determined by the Court.

IV.

Notice of the Forthcoming Investigation

The following government officials are herewith notified of Dr. David M. Helfeld's appointment to investigate alleged non-compliance by the Psychiatric Hospital and the San Patricio Mental Health Center: Dr. Johnny Rullán, Secretary of Health of Puerto Rico and Dr. Dalila Aguilú, Administrator of ASSMCA. Also to be notified are the following: Dr.. Reynaldo Rodriguez Llauger, Medical Director, Rio Piedras Psychiatric Hospital; Dr. Orlando Torres, Director, San Patricio Mental Health Center; Carlos del Valle, Esq. Special Counsel, Office of the Secretary of Justice of Puerto Rico; Orlando González, Executive Director, ASSES; Dr.

Erick Graffals, President, Behavioral Health Care Partners.

IT IS SO ORDERED.

San Juan, Puerto Rico, April 29, 2003.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief U.S. District Judge

Bird
Del Valle
4/28/03

/s/ Cs

EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO-AYALA, et al, Plaintiffs, v. GOVERNOR OF PUERTO RICO, et al Defendants.	Civil No. 74-1301 (HL)

ORDER

(Filed Jan. 28, 2002)

I. Brief History

In 1974, twenty-eight years ago, Roberto Navarro Ayala, a mentally retarded patient at the Rio Piedras Psychiatric Hospital (RPPH), filed a civil rights class action in this Court. The complaint rightfully asserted that the federally protected constitutional rights of the patients were being violated by overcrowding, inadequate care, and harsh conditions at RPPH.

On April 20, 1977 this Court approved a stipulated consent decree which included eighty-six standards that the parties consented to observe at the Hospital. Between 1977 and 1984 this case remained in a semi dormant state with little or no activity. In February 1985 the Court appointed Dr. David M. Helfeld, former Dean of the University of Puerto Rico Law School, as a Special Master. The Court directed the Special Master

to ensure that the parties comply with the 1977 stipulation agreement and to file periodic reports to the Court. Taking his commission to heart, the Special Master filed with the court forty voluminous and thorough reports recommending improvements and reforms at the RPPH, as well as other facilities.

The 1974 complaint named as defendants: Rafael Hernández Colón, then Governor of Puerto Rico, José Alvarez de Choudens, then Secretary of Health; Eric Santos, then the Director of the Hospital; and Concepción Pérez, then Administrator of the Hospital. The various changes of administration in Puerto Rico led the Court to change the title of the case to *Navarro Ayala v. Governor of Puerto Rico*, since this litigation is brought against defendants not in their personal capacities but in their official capacity. *Santiago v. Corporación de Renovación Urbana y Vivienda de P.R.*, 554 F.2d 1210, 1213 (1st Cir. 1977) (holding that a successor in office is automatically substituted under F.R.Civ.P. 25(d)). Thereafter, a series of contested and litigated issues followed. There were periods of progression and regression, many resulting from the changes in the administration, delays in appointment of administrators, substitution of counsel, and in many occasions, what appeared to be idiosyncratic attitudes.

In 1993, the Governor attended a meeting at this Court to discuss the status of the case with the undersigned Judge, the Special Master, and counsel. Subsequently, the Governor designated Manuel Díaz Saldaña, then Secretary of the Treasury, to see to it that the reforms that had to be fulfilled were carried out within the shortest period possible. Thereafter, Secretary Díaz Saldaña gave his undivided attention to this case,

cooperating fully with the Court and the Special Master's recommendations to achieve compliance with the stipulations and the Court's orders.

II. Progress and Compliance

During the long and tortuous path of this institutional litigation to vindicate plaintiffs' constitutional rights as patients at RPPH, the Court was compelled to assess monetary fines in the amount of $95,000.00 to achieve compliance with the Court's order and stipulations.

On June 18, 1997, following a formal hearing where the Governor, then Secretary of Health Carmen Feliciano, the Special Master, and counsel appeared and addressed the Court, the Court entered an order finding that it was satisfied that compliance priorities were recognized by all to be overcrowding, de-institutionalization, physical plan remodeling, the need for a compliance plan, and the development of an adequate pre-and-post-Hospital support system (the "Rehabilitation plan"). The Court found, and still finds, that pre-and-post-Hospital support systems are essential to keep and maintain the Rio Piedras Psychiatric Hospital de-institutionalized and constitutionally healthy. The 37th and 40th Special Master's reports recognized that defendants had made tremendous progress in complying with the 1977 stipulations; that the much-needed reforms have been institutionalized; and that substantial compliance with the stipulations embodied in the Consent Decree have been accomplished. In consideration of the progress accomplished, the Court ordered that the $95,000 in fines be returned to the Secretary of the Treasury. The funds were ordered earmarked for the specific purpose of promoting and enhancing the therapeutic environment at

the RPPH for the benefit of the patients and their families. Pursuant to the Court's order recreational facilities, structures, illumination, signs, and subscriptions for a reading room were provided to the patients.

III. Accreditations

In January and March 1999 RPPH received accreditations by the Joint Commission for the Accreditation of Health Care Organizations (J.C.A.H.C.O.) and by Medicare, respectively. Whereupon the Court entered on March 9, 2000, the following order:

> **All monies received by or credited to the Puerto Rico Department of Health, the Mental Health and Anti-Addiction Services Administration, or the Dr. Ramón Fernández Marina Psychiatric Hospital ("Hospital") from Medicare or any private entities in payment or reimbursement for medical or psychiatric services rendered at the Hospital shall be allocated by the Government of Puerto Rico to the Hospital's operational account(s) and used as operating funds. Until further orders of the Court, such monies shall not be used by the Department of Health, the Mental Health and Anti-Addiction Services Administration, the Hospital, or any other Puerto Rico governmental agency or instrumentality for any purpose other than as specified herein. (Docket no. 476.)**

On August 11, 2000, the parties filed a Joint Stipulation and Order of Dismissal asserting substantial compliance with the Consent Decree, pledging to maintain the J.C.A.H.C.O. accreditation, and agreeing to maintain a yearly appropriated budget of at least $18,929,000.00 to

adequately provide for the health, welfare, safety and treatment of the patients at the RPPH. The parties further stipulated that defendants shall continue to hold meetings of the Implementation Committee and of the Hospital Governing Board, the latter as successor to the Steering Committee. The Court adopted and entered the order. Docket no. 494.

In January 2001 a new administration took office in Puerto Rico. The Court held in abeyance any rulings on the joint stipulation so that the new administration could familiarize itself with this institutional litigation and demonstrate its willingness and commitment to the constitutional rights of the RPPH's patients. Dr. Johnny Rullán, the present Secretary of Health, promptly showed his commitment to, and good faith in, complying with the stipulations and the Court's order. Dr. Rullán sought and obtained a meeting with the Court on March 28, 2001 to discuss the status of the case. Thereafter, Dr. Rullán an [sic] his staff have seen to it that the Hospital continues to comply with the Consent Decree and the court's order, including holding meetings of the Governing Board, the Implementation Committee, and notifying the Court with copies of the minutes.

Finally, on December 13, 2001 the undersigned Judge attended a special meeting of the Governing Board, and thereafter inspected the facilities accompanied by counsel and the former Special Master. The Court is now ready to rule upon the joint motion to finalize this lengthy and at times frustrating litigation. The efforts, energy, and time devoted to vindicate the patients' constitutional rights at the RPPH have not been in vain.

The Court would be remiss if it did not acknowledge the Special Master, Dr. David Helfeld, the Deputy Special Master, Rita Rodríguez Falciani, the Advisory Interdisciplinary Team, Manuel Díaz Saldaña, and then-Secretary of Health Carmen Feliciano for their accomplishments in bringing the conditions at the RPPH to constitutional standards. This group dedicated their time and efforts over the past years to improve the life of the mentally ill at the RPPH. Together they have accomplished a noteworthy feat. Special recognition goes to Dr. Helfeld. Transforming the Hospital into a modern institution for the mentally ill has not merely been a job but a passionate personal goal. On behalf of the Court, the parties, and, most importantly, the patients in the Hospital who suffered under what were medieval living conditions before this case began, the Court thanks Dr. David Helfeld for his work. The Court of Appeals as early as December 18, 1991 noted the progress made in this institutional reform litigation and recognized that "the district judge and the court-appointed master have done an outstanding job performing the role of policy planners and managers to see that the complex legal goals inherently part of this litigation come about. . . ." *Navarro-Ayala vs. Hernández Colón*, 951 F.2d 1325, 1346 (1st Cir. 1991).

The Court also acknowledges the dedication and leadership of Secretary of Health Johnny Rullán and his staff in assuring compliance with the stipulations and Court's orders, and his pledge to continue the incredible transformation of the Río Piedras Psychiatric Hospital from its medieval state to a well organized, well respected accredited institution which carefully treats and respects the constitutional rights of its patients.

Conclusion

The reward and satisfaction for providing a less restricted environment, adequate treatment, a therapeutical environment for mental patients – a vulnerable class – at RPPH is priceless. A sense of fairness and respect for human dignity require no less. Because there no longer appears to be overcrowding, understaffing, poor living conditions or inadequate care and treatment of patients at the Río Piedras Psychiatric Hospital as the complaint originally asserted, and given the stipulation for dismissal filed by the parties, the Court hereby approves the joint stipulation and hereby orders this case dismissed. The Court's order of March 9, 2000 (docket no. 476) and the Joint Stipulation and Order of Dismissal of August 11, 2000 (docket no. 494) shall remain in effect to ensure the continued constitutional protection of the patients of the RPPH.

IT IS SO ORDERED

San Juan, Puerto Rico this 28th day of January, 2002.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief, U.S. District Judge

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO-AYALA, et al., Plaintiffs, v. PEDRO ROSSELLO GONZALEZ, et al., Defendants.	Civil No. 74-1301 (HL)

ORDER

(Filed Mar. 9, 2000)

Upon the parties' Joint Stipulation Concerning Application of Medicare Funds Received by the Rio Piedras Psychiatric Hospital, Dkt. No. 474, the Court hereby orders and decrees the following:

> All monies received by or credited to the Puerto Rico Department of Health, the Mental Health and Anti-Addiction Services Administration, or the Dr. Ramón Fernández Marina Psychiatric Hospital ("Hospital") from Medicare or any private entities in payment or reimbursement for medical or psychiatric services rendered at the Hospital shall be allocated by the Government of Puerto Rico to the Hospital's operational account(s) and used as operating funds. Until further orders of the Court, such monies shall not be used by the Department of Health, the Mental Health and Anti-Addiction Services Administration, the Hospital, or any other Puerto

Rico governmental agency or instrumentality for any purpose other than as specified herein.

IT IS SO ORDERED
In San Juan, Puerto Rico
This 9th day of March, 2000

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief United States
District Judge

s/c
C Garcia
DOJ
3/9/00
/s/ [illegible]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	/	
Plaintiffs,	/	
v.	/	CIVIL NO.
RAFAEL HERNANDEZ COLON, et al.,	/	74-1301 HL
Defendants.	/	

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ORDER

The Court having determined by order dated February 1st, 1985, that a Master should be appointed to monitor the implementation of a consent decree entered into by the parties, and approved by the Court, on April 20, 1977, and judgment filed thereon on June 3, 1977, it is hereby ORDERED:

1. That Dr. David M. Helfeld shall be appointed Special Master to monitor the implementation of the decree.

2. That the Master shall act as an officer of the Court and shall serve solely the Court and the interests of justice.

3. That the Master shall undertake his duties as soon as practical following this appointment and shall serve for two years from the date of appointment, unless such term shall be extended by the Court.

4. That upon the resignation, termination for cause or inability of the Master to continue to serve, the Court

shall appoint a replacement after consultation with the parties.

5. That the Master shall devote such time to his duties as he consideres [sic] necessary to fulfill the purposes of his office. The Master is authorized to retain such professional and clerical assistance as he deems necessary, subject to review by the Court.

6. That the Master shall have the following duties, responsibilities, and authority:

a. *The Master shall have only those powers and responsibilities specified herein.*

b. The Master shall become familiar with all provisions of the consent decree and shall set a time and place for a meeting of the parties and/or their attorneys at the earliest date convenient.

c. The Master, in consultation with defendants and plaintiffs' counsel, shall develop evaluation systems to measure the extent of defendants' compliance with each of the standards set forth in the decree.

d. In addition to the reports required by the decree, the Master may require defendants to file with him factual reports on any matter covered by the consent decree. Such additional reports shall be in a form prescribed by the Master and shall be filed as requested by the Master, but no more frequently than every 60 days.

e. All reports submitted to the Master shall be available for inspection and copying by all parties to this action.

f. The Master shall have access to all facilities, records, documents and persons affected by or involved in the implementation of this decree for the

purpose of gathering information relevant to enforcement of the decree. The Master shall have the authority to conduct inquires and consult with professionals to assist in finding facts relevant to implementation.

g. The Master shall hold meetings as often as he deems necessary, at which any employee, resident, parent, foster parent, next of kin or guardian, or any other person deemed by the Master to have an appropriate interest, may appear and make recommendations, comments, or suggestions as to any matter covered by this decree.

h. The Master shall report in writing to the Court and the parties every two months on the progress made in carrying out the provisions of the consent decree. Each report shall include a description of all disputes and interpretative questions resolved by the Master, a description of all suggestions and recommendations made by the Master, a statement of problems the Master has been unable to resolve, and recommendations of the Master for modification of the decree. Before filing his report the Master shall submit a draft thereof to all parties for the purpose of receiving their suggestions. The Master may submit special reports to the Court and parties at any time.

i. Informal suggestions. The Master may make informal suggestions to the defendants, in whatever form he deems appropriate, which in his opinion will facilitate compliance with the decree.

j. Recommendations.

(1) The Master shall have the authority to make recommendations with regard to implementation of the decree if: (a) he determines defendants are not in compliance with the decree; (b) this determination is accompanied by written findings of fact which indicate

the source of the evidence upon which each finding is based; and (c) the recommendations are consistent with and can be implemented within the framework of the decree. Such recommendations shall include, where necessary, timetables for implementation of steps or measures necessary to bring defendants into compliance.

(2) Copies of each recommendation accompanied by the findings of fact required by (1) of this paragraph shall be filed with the Court and served upon counsel for the parties. All parties shall be bound by the recommendation unless within 15 business days any party files an objection with the Master and requests a hearing. A copy of any such request shall be filed with the Court and served upon counsel for all parties. Objections may be made on the basis that (a) the findings of fact relied upon by the Master are erroneous; (b) the Master's determination of noncompliance is erroneous, or (c) the Master's recommendations are beyond the provisions of, or inconsistent with the decree.

(3) The hearing on the objections shall be held before the Master at the earliest convenient time. Each party shall have the right to present evidence of a documentary and testamentary nature, and to cross-examine adverse witnesses. The Master shall make a record of all proceedings and render a written decision within 10 business days and provide the parties and the Court with a copy of the decision.

(4) The parties may agree prior to the hearing to be bound by the Master's written decision.

(5) If an agreement to be bound by the Master's decision has not been reached, any party may apply to the Court, with notice to all parties and the Master, for review of the Master's decision. An application for

review must be filed within 15 business days after the Master's written decision is rendered. Upon receipt of the notice of application for review, the Master shall certify the record of hearing to the Court. Review shall be on the record unless the Court determines that a hearing is necessary. The Court may adopt the Master's decision or may modify it or may reject it in whole or in part or may remand it with instructions.

(6) Any party may submit a written request to the Master for specific action. A copy of any such request shall be fild [sic] with the Court and served upon counsel for all parties. The Master shall file a response with the Court within 15 business days, and shall serve said response upon counsel for all parties. Any party may file an objection to the Master's response and request a hearing pursuant to the provisions of this paragraph.

(7) The Master shall be compensated at the rate of $100.00 per hour. In addition, the Master shall be reimbursed for reasonable expenses necessarily incurred in the discharge of his responsibilities under this order. Such expenses may include: fees and expenses of expert consultants, expenses of paraprofessional staff, travel expenses, fees of a stenographer for hearings which are transcribed, and, to the extent services or facilities are not provided by defendants, office expenses, and clerical expenses. The Master's compensation shall not exceed $50,000.00 per year, unless an amount in excess of $50,000.00 is authorized by the Court, after opportunity for hearing by the parties. Expenses shall not exceed $10,000.00, unless authorized by the Court. The compensation and expenses of the Master shall be paid monthly by the Department of Health of the Commonwealth of Puerto Rico.

7. This appointment is effective on the 12th day of February, 1985.

IT IS SO ORDERED.

San Juan, Puerto Rico, February 8, 1985.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
U.S. District Judge.

May 19, 2003

FAX-787-765-5888

From: Dr. David M. Helfeld, Special Master
To: Dr. Dalila Aguilú, Administrator, ASSMCA

Re: **Investigation Ordered by the Court, April 29, 2003 in the Case of *Roberto Ayala v. Governor of Puerto Rico*, Civil No. 74-1301 (HL)**

1. This is to reiterate my oral request to Dr. Aguilú to deliver to me a copy of the document drafted in the Office of Management and Budget of the Commonwealth Government which proposes that a study be undertaken to determine if the mental health services provided by BHP are being duplicated by the services under the aegis of ASSMCA. It is my understanding that the OGP document led to contracting the services of Price Waterhouse to carry out the study. Please inform me if the study is in process and, if so, in what stage is it at present.

2. In the interviews which I have carried out since beginning the investigation ordered by the Court, I have received the same information from all officials, professionals and non-professionals that requisitions, requests to fill vacancies, indeed all petitions which involve the expenditure of public funds, have been regularly denied or postponed for long periods. The reason given by ASSMCA central headquarters' officials, all informants state, is that no funds are available. If that is the case, that no funds are available, it is essential for the Court to be informed why that is so. Specifically, why has the Court-ordered budget for the Psychiatric Hospital been indequate [sic] to fund a full staffing pattern of psychiatrists, an adequate and uninterrupted supply of medicins [sic], supplies and equipment of all kinds and transport facilities, among

other items necessary to the Hospital's effective functioning? To respond to that question, you are cited to appear at the Court's chambers Thursday, May 22, 2003, at 10.00 a.m. There should accompany you, for the purpose of supplying information on all requisitions and personnel requests which have been denied, ASSMCA officials of your selection who regularly deal with budget, finance, and the processing of requests from the Hospital and the San Patricio Mental Health Center. Your cooperation in this matter will be appreciated.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al,

Plaintiffs,

v. Civil No. 74-1301 (HL)

GOVERNOR OF PUERTO RICO, et al.

Defendants.

ORDER

(Filed Jun. 13, 2003)

On January 28, 2002, the Court issued an order providing, in relevant part, that its "order of March 9, 2000 (docket no. 476) and the joint Stipulation and Order of Dismissal of August 11, 2000 (docket no. 494) shall remain in effect to ensure the continued constitutional protection of the patients of the RPPH." (*See* Docket No. 503.)

It has recently come to the Court's attention that the defendants might not be in compliance with the aforementioned order. Accordingly, on April 29, 2003, the Court reappointed Dr. Helfeld, who served as a Special Master in this case for several years, to investigate and verify the alleged violation of the Court's order. (*See* Docket No. 508.) Shortly thereafter, Dr. Helfeld conducted an investigation and on June 3, 2003, filed a report with the Court detailing his findings. (Docket No. 513.) Dr. Helfeld's report appears to corroborate the allegations regarding defendants' non-compliance with their budgetary responsibilities and

other conditions at the RPPH. Contrary to the Commonwealth's assertion in its motion of May 6, 2003 (Docket No. 509), a Special Master can make ex-parte investigations and findings, as long as the defendants are afforded an opportunity to challenge them.

The Court has scheduled a status conference on **June 17, 2003, at 4:00 pm**, to afford the defendants the opportunity to state their position regarding this matter. The Court denies defendants' motion to stay the investigation (Docket No. 510) without prejudice, until it has an opportunity to hear and evaluate defendants' specific objections to the Special Masters' report.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 13th day of June 2003.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.

Plaintiffs,

v.

GOVERNOR OF PUERTO RICO, et al.

Defendants.

Civil No. 74-1301 (HL)

ORDER

(Filed Jun. 18, 2003)

On January 28, 2002, after a prolonged and tortuous civil rights litigation involving the conditions at a Psychiatric Hospital of the Commonwealth of Puerto Rico ("RPPH"), this Court entered an order approving the parties' joint stipulation and ordering the dismissal of the case. (*See* Docket No. 503.) In its order, the Court unambiguously stated that its March 9, 2000, order (Docket No. 476) and the August 11, 2000, Joint stipulation and Order of Dismissal (Docket No. 494) would remain in effect to ensure the continued constitutional protection of RPPH's patients.

The Joint Stipulation submitted by the parties and approved by the Court is analogous to a consent decree. In institutional reform litigation, such as this one, a district court has "broad discretion [to] determin[e] . . . whether the objectives of the decree have been substantially achieved." *Navarro-Ayala v. Hernández-Colón*, 951 F.2d 1325, 1337 (1st Cir. 1991). The First Circuit Court of Appeals has noted that "consent decrees are not merely

final judgments, but a special species of that genre – final judgments that can be 'reopened . . . to the extent that equity requires.'" *Inmates of Suffolk County Jail v. Rouse*, 129 F.3d 649, 658 (1st Cir. 1997) (citation omitted). Here, the Court decided to conduct an investigation after receiving multiple letters and reports from healthcare workers suggesting that the Commonwealth was not complying with the terms set forth in the consent decree, particularly as it relates to the funding of the Hospital's operational accounts. On April 29, 2003, the Court proceeded to appoint Dr. David Helfeld, who had served as Special Master in this litigation for several years, to ascertain the veracity, or lack thereof, of the multiple complaints received by the Court. (*See* Docket No. 508.). Dr. Helfeld's investigation ended prematurely when the defendants decided not to cooperate with the investigation and instead proceeded to appeal the Court's April 29, 2003 order.

Presently before the Court is a "Motion Submitting Affidavits and Notifying Appeal" (Docket No. 510)[1], in which defendants ask the Court to stay Dr. Helfeld's investigation pending the outcome of an appeal questioning the legality of the Special Master's reappointment. In addition, defendants filed an "Informative Motion" on June 16, 2003 (Docket No. 518), arguing, *inter alia*, that this Court lost jurisdiction over this case once they filed their appeal.[2]

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[1] The Court denied this motion without prejudice (Docket No. 517) and afforded defendants an opportunity to discuss this matter at the June 17, 2003 status conference.

[2] In their motion, defendants cite a single case in support of the proposition that the filing of a notice of appeal divests this Court of its

(Continued on following page)

Defendants' arguments are misguided and misleading. The notice of appeal does not deprive this Court of jurisdiction because the order from which they seek an appeal is an interlocutory, non-appealable order. *See* 9a Wright & Miller, *Federal Practice and Procedure* § 2615, at 707 ("An order of reference to a master is interlocutory and not appealable."). *See also Morales Feliciano v. Rullan*, 303 F.3d 1, 10 (1st Cir. 2002) (dismissing appeal for want of appellate jurisdiction because the district court's order was within the court's reserved power to establish procedures to assure compliance with the court's earlier decrees); *Hook v. State of Arizona*, 120 F.3d 921, 925 (9th Cir. 1997) (appointment of special master is generally an interlocutory order and not appealable); *Hammon v. Barry*, 752 F.Supp. 1087, 1092 (D.D.C. 1990) (court disregarded the notice of appeal from the non-appealable order relative to the appointment of the special master and proceeded with the case). The Court will not allow defendants to use dilatory tactics, such as the filing of this appeal, while the conditions at the RPPH continue deteriorating.

In addition, it is settled law that "federal courts have the inherent power to appoint [Special Masters] to oversee the implementation of . . . consent decrees." *United States v. Connecticut*, 913 F.Supp. 974, 984 (D. Conn. 1996) (citation omitted); *See also Cordoza v. Pacific States Steel Corp.*, 320 F.3d 989, 995 (9th Cir. 2003) (appointment of a

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authority to proceed. The Case, *United States v. Brooks*, 145 F.3d 446 (1st Cir. 1998) is inapposite given that it deals with 18 U.S.C. § 3731, the Statute pertaining to appeals by the United States in criminal cases. The statute relevant to the present situation is 28 U.S.C. § 1292.

special master to develop a plant site and fund a medical plan conforms with the long tradition, with its roots in equity, of using special masters in post-judgment proceedings). Thus, the Court understands that it has the authority, and indeed the duty, to appoint Dr. Helfeld as special master, to assure the full Commonwealth's full compliance with the Court's previous orders.

In his unfinished report (Docket No. 513), Dr. Helfeld states that there is evidence suggesting that the Hospital has not had full access to its official budget of 18.9 million dollars as mandated by this court's order. At the June 17, 2003 status conference defendants were expressly afforded an opportunity to oppose Dr. Helfeld's preliminary findings, and yet were unable to do so.[3] In fact, defendants conceded that the Hospital is currently facing some problems, both pertaining to its financing and to the hospital's ability to attract and retain psychiatrists. The Court does not doubt the well-meaning intentions of Health Secretary Dr. Rullán, Mental Health and Anti-Addiction Services Administrator Dalila Aguilú, and all the other members of the Commonwealth's Department of Health staff present at the July 17, 2003 meeting. However, the Court is convinced from a reading of Dr. Helfeld's preliminary

[3] At the status conference, defendants brought forth proof of the recent creation of a Special Committee which responsibilities will include strengthening the management of the RPPH and establishing administrative and fiscal structures to make psychiatric medical services more efficient. Defendants also presented to the Court a Financial Report detailing the Hospital's budget for the year 2002-03. Notwithstanding defendants' well intentioned steps to address the deteriorating conditions at the RPPH, they failed to make any specific objections to the findings and recommendations in Dr. Helfeld's unfinished report.

report and the discussions at the conference that the need to continue this investigation is warranted to ensure the constitutional protections of the patients of the RPPH.

In conclusion, the Court denies the defendants' petition to stay the investigation pending the appeal. In addition, the court reaffirms its prior decision to appoint Dr. Helfeld as Special Master to conduct any investigation which he deems necessary in order to ascertain if the Commonwealth is in compliance with all court orders. The Court expects the defendants' full cooperation with the Special Master's investigation as represented to the Court on the June 17, 2003 status conference. The special master's term will expire on **December 31, 2003**, unless the same is extended by the Court.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 18th day of June 2003.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.

Plaintiffs,

v.

GOVERNOR OF PUERTO RICO, et al.

Defendants.

Civil No. 74-1301 (HL)

MINUTES OF PROCEEDINGS

(Filed Jun. 23, 2003)

The Court held a status conference on July 17, 2003, at 4:00 pm, in order to discuss the recent re-appointment of Dr. Helfeld as Special Master and allow the Commonwealth defendants an opportunity to oppose and rebut the recommendations and findings of the Special Master's unfinished report. Present at the meeting were: the Secretary of the Department of Health, Dr. Johnny Rullán; ASSMCA's Administrator, Dalila Aguilú; Orlando González Rivera form [sic] ASES; Eileen Ramos, Francisco Alvarez and Yolanda Falcón from ASSMCA; Reynaldo Rodríguez; Attys. Linda Navedo and Carlos del Valle from the Commonwealth's Department of Justice; and Attys. Carlos Garcia Gutiérrez Alejandra Bird López Rafael E. Rodríguez Rivera and Manuel A. Rodríguez Banchs for the plaintiffs.

The defendants informed the Court of the recent creation of a Special Committee which will be responsible of [sic] strengthening the management of the RPPH and establishing administrative and fiscal structures to make

psychiatric medical services more efficient. Additionally, defendants submitted an internal report of the Hospital's budget for the fiscal year 2002-2003. Nonetheless, the Court informed the parties that after reading Dr. Helfeld's preliminary report, he had lingering doubts about the Commonwealth's compliance, or lack thereof, with the previous orders issued by the Court, and thus intended to allow Dr. Helfeld to conclude his investigation. The Court also informed the parties that an order relative to the defendants' motion to stay proceedings would be filed the next work day.

It should be noted, that the [sic] all the parties agreed that the Judge could engage in *ex-parte* meetings with all parties in this case, so as to inquire into the efforts that are being made to comply with previous court orders. Also, the parties agreed to be interviewed *ex-parte* by Special Master Dr. Helfeld. Dr. Helfeld expressed his intention to continue his investigation by interviewing ASSMCA's personnel in relation to the budget and the denial of certain requisitions. The meeting was adjourned at 6:10 pm.

In San Juan, Puerto Rico, this 19th day of June 2003.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.

Plaintiffs,

v.

GOVERNOR OF PUERTO RICO, et al.

Defendants.

Civil No. 74-1301 (HL)

ORDER

(Filed Jul. 16, 2003)

On June 23, 2003, the defendants filed a motion requesting that the fiscal statement which was presented at the June 17, 2003 status conference be included in the record, and requesting a transcript of the status conference. (Docket No. 524.) Thereafter, Special Master Dr. Helfeld and the plaintiffs filed responses to defendants' motion. (Docket Nos. 527 and 529.) For the reasons set forth below, defendants' motion of June 23, 2003 (Docket No. 524) is **DENIED**.

As previously mentioned, defendants have asked the Court to produce transcripts of the June 17, 2003 status conference. The Court is bewildered by defendants' disingenuous request. Defendants' counsel is well aware, as was everyone else present, that there was no court stenographer at the June 17, 2003 status conference, nor did the defendants request one. In fact, throughout this tortuous and prolonged civil rights litigation there have been multiple status conferences, which have been conducted without a court stenographer. Both the Special Master and

plaintiffs' counsel have questioned defendants attorney Carlos Del Valle's good faith in light of this nonsensical request. The Court reminds counsel Del Valle that while an attorney has a duty to file a motion supporting his clients' cause, the motion must be tendered in good faith and may not contain factual misrepresentations. The Court finds that counsel Del Valle was well aware that there was no stenographer at the conference, and that his request for a transcript under such circumstances is an attempt to mislead the Court of Appeals into believing that such a transcript exists. Defendants' counsel is reminded that even though the Court welcomes zealous advocacy, it must be exercised within ethical boundaries.

Defendants have also requested that the fiscal report produced by ASSMCA for the year 2002-2003[1], and brought to the Court's attention at the status conference, be included as part of the record. The ASSMCA report is not part of the record, because the June 17, 2003 status conference was not an evidentiary hearing. The Court has not conducted an evidentiary hearing, but rather is in the process of conducting an investigation with the assistance of Special Master Dr. Helfeld, a former Dean of the University of Puerto Rico's Law School and a reputable constitutional scholar. Defendants have grossly misconstrued the Court's concerns. The Court was prompted to

[1] It should be noted that defendants brought forth a copy of this report, in Spanish, to the June 17, 2003 status conference in an effort to corroborate that the budget of the Psychiatric Hospital of the commonwealth of Puerto Rico ("RPPH") was 18.9 million dollars. The Court reminds the defendants that in the future documents submitted to the Court shall be in English in accordance with Local Rule 108. *See, e.g., Ramos-Baez v. Bossolo-López*, 240 F.3d 92, 93-94 (1st Cir. 2001).

re-appoint Dr. Helfeld in order to determine whether conditions at RPPH have deteriorated and whether the hospital had access to its projected budget as mandated by previous court orders. Now that the ASSMCA has made its data available to the Court, the Special Master will be able to assess the accuracy and reliability of the information contained in said fiscal report. The Court will not make any findings until the Special Master has had an opportunity to file a complete report, and until the parties are afforded the opportunity to file their objections to the Special Master's report.

In their motion, defendants have also expressed concern that the minutes of the June 17, 2003 status conference (Docket No. 523) indicate that the parties agreed that the Court, as well as the Special Master, could meet *ex-parte* with all the parties in this case. It should be noted, at the outset, that the court has no intention to engage in needless *ex-parte* communication with the parties. The Court, however, is cognizant of the unusual circumstances characterizing institutional reform litigation. Accordingly, if the need arises, it may be pertinent to meet or have a telephone conversation *ex-parte* with one of the parties. Nonetheless the minutes shall be clarified to the extent that there were no objections to the Court meeting or conferring with the Secretary of Health informally, as has been done in the past with the previous Secretary of Health.

Finally, plaintiffs filed a motion on July 8, 2003 (Docket No. 528) asking the Court to allow them to conduct discovery and requesting a hearing. The Court will wait until the Special Master files his final report to decide whether or not an evidentiary hearing should be scheduled, and whether discovery should be allowed.

CONCLUSION

In view of the aforementioned, defendants' motion requesting that the fiscal statement which was presented at the June 17, 2003 status conference be included in the record, and requesting a transcript of the status conference (Docket No. 524) is hereby **DENIED**. Plaintiffs' request to conduct discovery (Docket No. 528) shall be addressed after Dr. Helfeld files his final report with the Court. The parties are reminded that the Court has broad discretion and flexibility when it comes to managing institutional reform litigation. *See, e.g., Navarro-Ayala v. Hernandez-Colón*, 951 F.2d 1325, 1337 (1st Cir. 1991). This is necessary to assure that the rights of the patients are not violated as a result of the deteriorating conditions at the RPPH. Defendants' counsel should note that the hospital's patients are best served by an attitude of cooperation rather than by stubborn litigation. The Court will not allow defendants to stonewall the Court's efforts to search for the truth by making a mountain out of a mole hill. Once the Special Master concludes his investigation and files a complete report, the Court will afford the parties the opportunity to file objections to the Special Master's report and hold an evidentiary hearing if warranted.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 15 day of July 2003.

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief U.S. District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Roberto Navarro Ayala, et al.

Plaintiffs,

v.

Governor Of Puerto Rico, et al.

Defendants.

Civil No. 74-1301 (HL)

ORDER

(Filed Dec. 9, 2003)

Before the Court is the Special Master's request for sanctions against defendants' counsel Carlos Del Valle Cruz ("Del Valle") for professional misconduct. (Dkt. 541). In particular, the Special Master cites Del Valley's "failure to counsel defendants against engaging in obstructionist conduct to the detriment of the Special Master's court-assigned investigation" as a breach of his professional and ethical obligations. In response, counsel Del Valle not only rehashes many of the same due process arguments that the First Circuit recently rejected, but he also peppers it with vitriol [sic] attacks on the Special Master and his investigation. (Dkts. 537 and 542).

After reviewing the parties' submissions, the Court believes that sanctions are not warranted at this time. However, the Court will not tolerate further personal attacks from counsel Del Valley who continues to ignore this Court's previous warnings to engage in advocacy that is "within ethical boundaries" and "in good faith." (Dkt. 532). These attacks do nothing to further defendants' position and instead only serves to harm the integrity and

credibility of the Psychiatric Hospital, the Commonwealth of Puerto Rico and its agencies. Accordingly, the Court hereby places counsel Del Valle on notice that any further personal attacks on the Special Master shall result in disqualification of counsel Del Valle from this case or in disciplinary actions.

IT IS SO ORDERED.

San Juan, Puerto Rico, December 9, 2003

/s/ Hector M. Laffitte
HECTOR M. LAFFITTE
Chief U.S. District Judge

Report of Investigation
In re Roberto Navarro Ayala, et al. v.
Governor of Puerto Rico et al.
Civil No. 74-1301 (HL)

by

Special Master Dr. David M. Helfeld
June 4, 2003

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D. Mass Petition to the Court by Hospital Employees, May, 2003.

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R. July 12, 2001 circular letter on austerity measures to ASSMCA's employees by the Administrator

S. May 13, 2003 letter from ASSMCA's Administrator to Special Master on the plan to resolve placement of MBH patients

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June 4, 2003

Box 22712, U.P.R.
San Juan, P.R. 00931

Hon. Hector M. Laffitte
Chief Judge
United States District Court
for the District of Puerto Rico
San Juan, Puerto Rico

Dear Sir:

I have the honor to present my first report as special master, designated by the Court's April 29, 2003 Order, in the case of *Roberto Navarro Ayala, et al. Plaintiffs v. Governor of Puerto Rico, et al,,* [sic] *Defendants,* Civil No. 74-1301 (HL), covering the period April 29 until May 22, 2003. At the outset of the investigation ordered by the Court, I informed the defendants' legal representative, Mr. Carlos del Valle, and Secretary of Health Johnny Rullan that defendants would have the opportunity to review this report prior to its submission to the Court in order for them to propose any corrections or additions which they might consider appropriate. In view of the decision of the defendants' attorney to obstruct compliance with the Court ordered investigation, and because the budgetary issues which are central to this report need to be resolved in timely fashion and therefore should be brought to the Court's attention as soon as feasible, I have decided to

submit this first report simultaneously to the Court and to the parties in the case.

This first report covers three principal questions:

1. How was the Court's ordered investigation carried out as of May 22, 2003 and how on the latter date did defendants' legal representative obstruct completion of the first phase of the investigation?

2. Whether defendants' budgetary decisions are in compliance with Court Orders and their own stipulated commitments?

3. Whether defendants are maintaining the Rio Piedras Psychiatric Hospital and the San Patricio Mental Health Center in compliance with Court Orders and their own stipulated commitments?

The report closes with my conclusions and recommendations.

It should be noted that this report does not cover the entire scope of the Court ordered investigation. That is because with respect to the three questions set out above, there is still data to be collected, including data not submitted in obedience to instructions by the defendants' legal counsel. In addition, the issues related to the impact of the MBHO's on the performance of mental health services at the Rio Piedras Psychiatric Hospital and its public pre and post supporting facilities, and whether that interaction is compatible with compliance with Court Orders, will be addressed in a later report. The principal reasons for postponement are two-fold: how BHP (Behavioral Health Partners) was functioning is no longer directly relevant since it no longer is one of ASES' contracting parties and its substitute, APS (American Psychiatric Service) has just

begun to implement its contractual obligations. There is a third reason which has been mentioned earlier: budgetary and fiscal considerations are urgently in need of the Court's attention and therefor should be given priority over the issue of the impact of the MBHO's.

I should acknowledge the assistance I have received from Dr. Nectar Torregrosa, one of Puerto Rico's most knowledgeable psychiatrists, who accompanied me in almost all of the interviews and inspections which were made. Her judgements on the quality of mental health services are of inestimable value because she brings to her critical insights her experience as the psychiatric member of the AIT, the Advisory Interdisciplinary Team, which served the Court for many years in this case. I should also inform the Court that most of the data presented in this report was only made possible because of the readiness of mental health officials, professional and nonprofessional employees, as well as public spirited citizens, to respond to my questions openly and with all candor. I believe that the motivation was their concern for the needs of the mentally ill.

Respectfully yours

/s/ David M. Helfeld
David M. Helfeld
Special Master

Copies to: Carlos del Valle, Esq.; Secretary of Justice Anabelle Rodriguez, Secretary of Health Johnny Rullan, ASSMCA Administrator Dr. Dalila Aguilu, Hospital Medical Director Reynaldo Rodriguez Llaugher, Hospital Executive Director Carlos Cabrera, San Patricio Center Director Orlando Torres and Carlos V. Garcia Gutierrez, Esq.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Roberto Navarro Ayala, et al.	*	
Plaintiffs	*	
v.	*	Civil No. 74-1301 (HL)
Governor of Puerto Rico, et al.	*	
Defendants	*	

Special Master's First Report for the Period April 29-May 22, 2003

I. The Steps Leading to the Court Ordered Investigation

Having received information early in March of this year alleging that "the budget for the Rio Piedras Hospital for the forthcoming year has been reduced from the $18,929,000.00 which is required by the Court's Order of January 28, 2002 . . . that during the present and past fiscal years funds budgeted to the Hospital's operations have been transferred to cover costs not related to the Hospital's operations, contrary to the Order's instructions, and . . . that the decision to shut down the San Patricio Mental Health Center is in violation of the Court's finding that 'pre-and-post support systems are essential to keep and maintain the Rio Piedras Psychiatric Hospital de-institutionalized and constitutionally healthy'", the Court ordered a Status Conference to be held March 18, 2003. At the Conference defendants made commitments which were later incorporated in an Informative Motion on April 12, 2003, to the effect that "(a) The Hospital's budget will meet the 18.9 million dollar limit. (b) The San Patricio facilities

are not going to be closed or privatized and (c) The Hospital's catchment area shall not be expanded." Defendants did not address the issue of whether funds from the Hospital's budget had been diverted to non-Hospital expenditures. The Informative Motion did present for the Court's review the draft of a proposed contract between BHP and ASSMCA which involved conditions for utilization by BHP patients of the facilities of the Rio Piedras Psychiatric Hospital. The contract provided that its execution would depend on the Court's review and approval.

In the days following the Status Conference and defendants' Informative Motion, the Court continued to receive a flow of communications from professionals and other employees, and from family members of patients being cared for by the Hospital, the San Patricio Center and by the Trujillo Alto Psychosocial Center, alleging actions and situations which, if factually sound, would constitute serious failures of compliance with the Court's January 28, 2002 Order. In its April 29, 2003 Order, the Court expressed its "Continuing Concern with Defendants' Compliance with the Order of January 28, 2002". Acting on that concern, the Court decided that it was imperative "to determine the veracity of alleged noncompliance" by the Hospital and that this should be accomplished through an investigation to be carried out "under its auspices." The Order then concludes:

> To that end, the Court herewith reappoints Dr. David M. Helfeld as Special Master to effectuate the investigation and to report to the Court his findings and recommendations with all deliberate speed. His authority to carry out the investigation is defined in the Court's original order

appointing him Special Master, dated February 8, 1985, which is herewith incorporated in the present Order.

II. Compliance, Objections and Obstruction by Defendants with the April 29, 2003 Order

The investigation's starting date was April 30, 2003 when three key officials were cited to appear at the Court: ASSMCA's Administrator, Dr. Dalila Aguilu, the Hospital's Medical Director, Dr. Reynaldo Rodriguez Llauger y San Patricio's Mental Health Center's Director, Dr. Orlando Torres. Ms. Linda Navedo, Attorney del Valle's assistant appeared on her own initiative and informed me that she had been instructed by Attorney del Valle to be present during the interviews of the latter three officials and to take notes of my questions and their answers. My response was that under the procedure which I planned to follow officials, employees and persons called to provide information would do so without the presence of counsel or anyone designated by counsel. In the case of Administrator Aguilu, an exception was made at her request to allow her consultant, attorney Rita Rodriguez Falciani, to be present, because of the information she might provide. In the case of Ms. Navedo, I requested that she be available for questioning after finishing the interview with Administrator Aguilu. I did so because Ms. Navedo serves in the Civil Rights Division of the Puerto Rico Justice Department as monitor over compliance with Court orders related to the *Navarro Ayala* case and because she has knowledge about the implementation of the Hospital's budget. She acceded to my request and was in fact the fourth person interviewed on March 30. It should also be mentioned that she

attempted to reach attorney del Valle who was in Mayaguez to ask for instructions. She informed me that she was unable to reach him and stated that rather than obstruct the interviews which had been scheduled, she felt that it was preferable to proceed as planned. Thereafter, I proceeded to interview Dr. Aguilu, Dr. Rodriguez Llauger, Dr. Torres and Ms. Navedo and to request that they provide the investigation with a variety of documents. At this stage there was complete compliance with the Court's April 29 Order.

On May 6, as agreed by telephone, I met with attorney del Valle at the Psychiatric Hospital and informed him that I would be meeting with the Hospital's principal officials, with the Medical Faculty and with the heads of the clinical and support departments. He objected to the investigation's procedures that I was following, claiming that it was a violation of due process for me to interview defendants and their employees without the presence of an attorney. I responded that the investigative procedure being followed did not in any way violate due process. I also indicated that it was my intention, as allowed under the terms of the Court's reference to the Special Master's investigative authority, that defendants would see a draft of my report prior to submission to the Court and would be entitled to have included in it their corrections, comments and additions. My response did not satisfy attorney del Valle who insisted on his due process objection. Nonetheless, he did not take any action to impede the interviews and meetings I had scheduled. In those meetings everyone responded with candor to my questions and agreed to submit reports on the subjects which were covered. The information which they provided, including reports and documents subsequently submitted, will be summarized in

later parts of this report. Notwithstanding attorney del Valle's due process objection, at this stage, as on the first day of the investigation, there was complete cooperation by all those interviewed: the Hospital's executive director, Ms. Jane Vega, all the doctors, both psychiatrists and clinicians, and all the supporting professional services and non-clinical department heads.

On behalf of defendants, attorney del Valle filed a motion on May 3 objecting to the investigation being carried out by the Special Master on grounds of violation of constitutional due process: "The Court has authorized an ex-parte investigation by the Special Master that does not adhere to the basic principle of due process of law, such as notifying counsel of the proposed objects of interview and allowing for the presence for counsel for either plaintiffs or defendants." The motion stresses that defendants have dealt in good faith with the Court, stand ready to respond to all inquiries and petition for a "status conference to formally address the issues that may be germane to its concerns." Subsequently, at various times, attorney del Valle orally repeated his due process argument and urged that the investigation procedures being followed be reshaped to conform to what he claimed were constitutionally correct.

On May 8 there was a meeting with Secretary of Health, Dr. Johnny Rullan. At attorney del Valle's insistence, I agreed to having him accompany the Secretary. I did so because I had every confidence that his presence would in no way affect the Secretary's candor in answering questions and in volunteering relevant information and that is the way the interview turned out to be. In response to his candor, I took the opportunity to share with the Secretary what all those I had interviewed thus far had emphasized:

that the Hospital's needed requisitions and requests to fill personnel vacancies in large numbers had been denied at the level of ASSMCA with the justification that no funds were available. On this day there was total cooperation with the Court ordered investigation. The same was true on May 9 when interviews were held at the San Patricio Mental Health Center, which included the Director, Dr. Orlando Torres, medical and professional staff and supporting services, as well as an advocacy group of professional staff which had been active in trying to avoid what was feared to be a decision to close down the Center as a public mental health institution. Once again, all participants, both staff members and the Director, were forthright in their answers to questions and in their readiness to prepare and submit written reports on the problems facing the Center.

It should be underscored that the readiness of all informants to provide data and written reports and documents was motivated by their recognition that serious problems were affecting the effectiveness of mental health services and that remedial action was needed. This was palpable not only on the part of those in leadership positions, but equally if not more so in the case of professional and non-professional employees. Similar concern was evident in the meeting which was held with the staff of the Trujillo Alto "Sicosocial" on May 16, which was also expressed in a written document submitted to the Court and which was signed by all the employees of that facility. It should be noted that the investigation was not limited to officials and employees responsible for mental health services. In addition, union officials, Mr. Juan E. Eliza Colon, President of the U.G.T., and Mr. Jimmy Tones Velez, Director of the Alianza SEIU, provided invaluable information and

documentation on the problems affecting the Hospital and the San Patricio Mental Health Center. The same was true of a number of mental health professionals who are members of the civil advocacy group "Comite de Convergencia": its president, Dr. Carlos O. Perez Cortes, and members Dr. Sarah E. Huertas and Dr. Enrique Rivera Mass, are all practicing psychiatrists who are actively engaged in efforts to ensure sound public policy programs in the field of mental health. The same is true of Professor Maria del Pilar Christian, an occupational therapist by profession, who is professor emeritus of the University of Puerto Rico and president the "Consejo Estatal de Planificacion de Salud Mental de Puerto Rico". The meeting with the union leaders took place on May 12 and the meeting with the members of the "Comite de Convergencia" on May 20.

The last meetings took place May 21. Dr. Torregrosa did not accompany me at those meetings which was different from our customary investigative practice of acting jointly as a team. My first meeting was with Acting Hospital Executive Director Cabrera Bonet and Ms. Jane Vega, Executive Director, who had yet to transfer to the new position to which she had been appointed. I requested Mr. Cabrera to collect all requisitions which had been denied for lack of funds during the past six months, and as well, petitions to fill personnel vacancies. He agreed to collect the data requested and had Ms. Vega work on the project. While they were so engaged, I visited Dr. Rodriguez Llauger to pick up the written report which he had prepared at my request, which diagnoses the principal problems affecting the delivery of services at the Hospital. When I returned to the office of the Executive Director I found that Ms. Vega and Mr. Cabrera had collected a large

number of requisitions which had been denied on grounds of lack of funds, but that there was still much to do. Mr. Cabrera promised to have collected all the information requested by Monday of the following week and said I could pick it up at that time. This information has not been made available because of the impact of a decision made by defendants later in the day of May 21.

The decision to cease all cooperation with the investigation, and therefor to cease complying with the April 29 Order, is embodied in defendants' "Motion Submitting Affidavits and Notifying Appeal" which bears the date of May 21, 2003. The motion is grounded on four points. First, the Court has failed to act on defendants May 5 motion requesting a status conference and on its constitutional due process objection to "the ex parte investigation being carried on by the Special Master with respect to a case which is judicially closed". Second, to support the May 5 motion, defendants submit five sworn statements of Dr. Aguilu, Dr. Rodriguez Llauger, Dr. Orlando Torres, Mr. Cabrera and of Ms. Vega, which state that they "have been questioned by the Special Master and required to produce documentation without notice to counsel for the parties, without the opportunity for counsel to be present and without notice of the request for production of documents;[1] in sum, the Special Master has engaged in fact-finding outside the margins of legal safeguards." Third, the motion

[1] For the record there are certain statements in the affidavits of Ms. Vega and Mr. Cabrera which do not square with my recollection of what took place in our meeting on May 21. The disputed statements have nothing to do with the investigative procedures which were followed. At an appropriate time, I will submit an affidavit providing the Court with my statement of what transpired.

states that on May 6 "the undersigned counsel raised these objections with the Special Master and the same indicated that he did not coincide with the legal arguments raised by the defendants and that he would proceed with his ex-parte investigation." Fourth, for the reasons stated in its prior motions, defendants inform the Court that they are proceeding to appeal the April 29 Order and that "therefore all proceedings should be stayed pending the outcome of the appeal." Accompanying the motion is a Notice of Appeal to the Court appealing from the April 29 Order and "from the Orders of May 19, 2003 of Dr. David Helfeld."

As has been noted, until May 21 there was complete compliance and cooperation with the investigation ordered by the Court, on the part of all officials and employees, notwithstanding defendants' motion which raised constitutional due process objections. What apparently decided defendants' counsel to file the May 21 motion was the FAX I sent to Dr. Aguilu, citing her to appear at the Court's chambers on May 22 to respond to two matters: first, to deliver "a copy of the document drafted in the Office of Management and Budget of the Commonwealth Government which proposes that a study be undertaken to determine if the mental health services of BHP are being duplicated by the services under the aegis of ASSMCA"; second, Dr. Aguila [sic] was requested to appear with agency officials who deal with requisitions, budget and finance to respond to the question of "why has the Court-ordered budget for Psychiatric Hospital been inadequate to fund a full staffing pattern of psychiatrists, an adequate and uninterrupted supply of medicines, supplies and equipment of all kinds and transport facilities, among other items necessary to the Hospital's effective functioning?"

The prelude to the question explained why it was being asked: "I have received the same information from all officials, professionals and non-professionals that requisitions, requests to fill vacancies, indeed all petitions which involve the expenditure of public funds, have been regularly denied or postponed for long periods. The reason given by ASSMCA central headquarter's officials, all informants state, is that no funds are available."[2] Also cited to appear on May 22 was Executive Director of ASES, the agency which regulates and contracts insurance agreements with the MBHO's.

When Dr. Torregrosa and I arrived at the Court's chambers on May 21, attorney del Valle was already there waiting. He handed me a copy of defendants' motion and notice of appeal and informed us that neither Dr. Aguilu would appear, nor any of her staff, nor would the Executive Director of ASES. He stated that henceforth there could be no contact by me with any of the defendants or their employees, nor could any document be obtained, except through him in his capacity as counsel to defendants. As he was about to leave, attorney del Valle made the following statement: "The Secretary is constituting a special committee of volunteers in order to submit to the Court periodic reports." He went on to explain that the reports would inform the Court of the progress being made to improve service at the Hospital.

What have defendants wrought, acting through counsel, by their May 21 motion and the instructions to officials

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[2] See Appendix A. Key documents in this report will be included in a compendium of appendices and will be identified by letter.

and employees not to meet or give information to the Special Master except with the permission of counsel? By obstructing this investigation, on their own initiative, defendants have effectively defied the Court's April 29 Order. As Special Master, I could insist that under the terms of reference of the Court I am authorized to continue questioning persons who have information within the scope of the investigation and to require the production of pertinent documents. To do so, in my opinion, would be counterproductive and surely unwise. It would be unfair to put officials and employees in the difficult position of having to respond either to the instructions of counsel not to cooperate with the investigation, and so demonstrate their loyalty, or to respond affirmatively to the questions and requirements to submit reports to the Special Master, and so show obedience to the Court's Order. Increasing the difficulty of going forward with the investigation is the fact that defendants' counsel has undoubtedly assured them that the Court's Order violates constitutional due process and is therefor illegal. Under these conditions, it is only the Court which is empowered to resolve legal doubts by ruling on defendants' constitutional objections and to determine whether the terms of the April 29 Order should or should not be enforced.

In defendants' May 21 motion it is stated that the Special Master "did not coincide with legal arguments raised by the defendants. It is in order to explain why my thinking does not coincide with defendants' counsel, though I should stress that whatever my views may be, it is entirely within the authority of the Court to resolve defendants' constitutional claims. To put the matter in a nutshell, counsel's due process objection is without merit because of contextual error and because of how the Special Master's

investigative report is to be treated after it is submitted. The investigation ordered by the Court is not the equivalent of a criminal investigation in which case his objections would be entirely well taken. Nor is it the equivalent of an administrative proceeding or a civil trial between adversaries. In its April 29 Order the Court exercised its inherent power to investigate whether its January 28, 2002 Order was being complied with, responding to alleged noncompliances of sufficient weight to justify an investigation, and to delegate in a Special Master to carry it out. It is surely significant that the authority to investigate, as effectuated in this case since April 29, was authorized in the Court's 1985 terms of reference and was so exercised in the years following without objection by the parties.

Even more of an error is defendants' failure to understand how the investigative report of the Special Master is treated once it is submitted. The findings and recommendations of the report are not automatically accepted by the Court. They must run the gauntlet of objections by the parties affected who have every right to challenge whether its factual conclusions are based on substantial evidence, whether there is evidence in refutation, whether opinions and recommendations are well grounded, as well as whether there are constitutional and jurisdictional claims they feel should be considered. After hearing the parties, including taking into account the outcome of any evidentiary hearing it might find to be necessary, it is the Court which decides the weight to be given to the Special Master's report. Once it is recognized that defendants will have their day in court, with unfettered opportunity to criticize the Special Master's report and to defend their legitimate interests, their claim of procedural unfairness is simply without merit. It is certainly significant that in all

of their motions relying on due process objections, not once do defendants cite a single case in support of their legal argument.

Beyond legal argument there are a number of facts which merit consideration. First, the May 21 motion gives the impression that the Court has delayed unconscionably in responding to defendants' petition that a status conference be held. However, counsel for defendants had knowledge that the judge was out of the country, as he admitted to me, and therefor was in no position to respond rapidly to the motions. Second, counsel was aware of the officials and employees who were being interviewed and would have had no problem in verifying the questions asked and in obtaining copies of any documents submitted to the Special Master. To illustrate this with a concrete example: copies of the report on the state of the Hospital and its problems, prepared by Medical Director Dr. Rodriguez Llauger at my request, were given to attorney del Valle, Secretary of Health Dr. Rullan and ASSMCA Administrator Dr. Aguilu. The reason that no attorney was permitted to be present in the interviews and meetings which were held, with the exception of the meeting with Dr. Rullan, is that I was convinced that most informants would be more candid and forthcoming if counsel were not present.

Nothing that has transpired thus far in the course of this investigation has caused me to change my mind about excluding counsel from the interviews and meetings which were held. It has resulted in a flow of information which is palpably open and candid. How much weight it should be given depends on the credibility of the informants' statements and the reliability of supporting documentary evidence. That, in turn, can only be determined by the Court after this report is scrutinized and criticized by

defendants. The sections which follow present the data collected on defendants' compliance with Court Orders related to budget and stipulated budget commitments and on whether defendants are maintaining the Psychiatric Hospital and San Patricio in compliance with Court Orders and their own stipulated commitments.

To sum up: in my opinion, this report is more than sufficient for the Court to confirm that its "continuing concern with defendants' compliance with the Order of January 28. 2002" is well grounded, as expressed in the April 29, 2003 Order. Thus, there is every reason to complete the investigation. This report is less than complete due to the obstructionist actions of defendants toward the close of the first phase of the investigation. Among other matters, there still needs to be submitted a report which Ms. Linda Navedo agreed to prepare on how a ten million dollar account, taken from the Hospital's budget, is actually administered by the Department of Justice of Puerto Rico, the report of the denied requisitions of the Hospital being prepared by Mr. Carlos Cabrera, reports pending from Dr. Dalila Aguilu, and an interview should be held with Dr. Aguilu and her team of officials to determine why the Hospital and the San Patricio Center have not received sufficient funding to effectively meet their needs and, additionally, an interview should be held with ASES Executive Director Orlando Gonzalez on how MBHO contracts impact on compliance with the Court's Orders.

III. Are Defendants' Budgetary Decisions in Compliance with Court Orders and Their Own Stipulated Commitments?

What alerted the Court to the fact that there might be budgetary decisions being made which were in conflict

with past orders, were communications brought to its attention early in March of this year. Specifically, the Court was informed that the budget for the Psychiatric Hospital in the recommended budget of the Office of Management and Budget for fiscal year 2003-2004 had been reduced from $18,929,000.00 to $16,631,000.00, a reduction of $2,298,000.00;[3] and the reduction in the budget of the San Patricio Mental Health Center was to zero due to the fact that "program will cease to exist in fiscal year 2003."[4] It was in reaction to the proposed budgetary cuts for the Hospital and the total eliminations of the San Patricio Center, among other matters, that on March 12, 2003 the Court convened a Status Conference for March 18. At the Status Conference, defendants made clear that the problem of the budgetary cuts had been resolved in a meeting with OMB Director Melba Acosta. The terms of the agreement as spelled out in the letter to ASSMCA' Administrator Dr. Aguilu, dated March 17, confirm the following:

1. OMB maintains under its custody $1m which will be transferred to cover expenses of the Rio Piedras Psychiatric Hospital beginning July 1, 2003.

2. Our Office will be reviewing the distribution of the recommended budget for ASSMCA for fiscal year 2003-04, in order to insure that the Rio

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[3] See page 40 of OMB"s [sic] recommended budget for ASSMCA for fiscal year 2003-04. It should be noted that the Hospital's budget for fiscal year 2000-2001 was also short of the amount required by the Court's Orders. In that year the budget amounted to 17.2 million. *Ibid.*

[4] See *id* at page 65.

Piedras Psychiatric Hospital has a minimum budget of $18,929,000.

3. The Adult Treatment Program, which includes the San Patricio Service Center and other facilities and services, has at its disposition a recommended budget for fiscal year 2003-04 of $22.6 millions. It is indispensable that you make the internal adjustments to insure that this Center can count on the necessary funds to operate in that year.[5]

In the Informative Motion, submitted after the Status Conference, defendants assured the Court of the following: "(a) the hospital's budget will meet the 18.9 million dollar limit. (b) the San Patricio facilities are not going to be closed or privatized and (c) the Hospital's catchment area shall not be expanded." Point I in the OMB letter was not brought up by defendants in the Status Conference or mentioned in the Informative Motion. What its significance might be is unclear, but it does raise questions. What was the source of the one million? Was it from the Court ordered 18.929 million and, if so, by what authority was OMB keeping it in its custody during the current fiscal year? If the one million was indeed taken from the Court ordered budget, OMB had acted illegally. A second point has to do with the commitment of budgeting 18.929 million for next fiscal year, as stated in the Informative Motion.

But if the final budget for next fiscal year, as submitted to the Treasury Committee of the House of Representative, is

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[5] The OMB original letter in its Spanish version is reprinted in Appendix B.

set at 17.929 million have defendants in fact kept their commitment? As stated in the Status Conference and in the Informative Motion the Court was led to believe that the official budget submitted to the Legislature would include the 18.929 figure unambiguously. It remains to be verified whether in fact an additional one million has been added de facto to the 17.929 in the official budget and, if so, an explanation is in order to inform the Court why the budget does not reflect openly that there has been compliance with the January 28, 2002 Court Order and the two prior orders which it incorporates, dated March 9 and August 11, 2000.

The latter three Orders in their reference to budgetary matters require defendants to follow three directives: (1) the annual budget assigned to the Psychiatric Hospital must be at least 18.929 million; (2) the budget must be used exclusively for the Hospital's operations; (3) whatever funds are earned by the Hospital from services rendered to Medicare patients or to private entities must be utilized exclusively for its own use without subtracting from the basic 18.929 million budget. The result should be a joint operating budget which can reach 20 million and more. Implied in these orders is something more than exclusive use: the assumption is that these funds will be fully used to meet the Hospital's needs, expeditiously and without undue bureaucratic hassle and are not to be manipulated or diverted to other than the Hospital's needs and purposes. The Court's Orders assume a genuine operating budget. Whether the Hospital has been able to count on such a budget is considered later in this report.

Turning to the budgetary treatment accorded the San Patricio Mental Health Center, the impression given by defendants at the Status Conference and the subsequent

Informative Motion was that it would be funded in the budget. When defendants stated in their motion that the "San Patricio facilities are not going to be closed or privatized", the message conveyed was that the Center would be restored as a program which was to be reinstated in the regular budget. At no time did defendants clarify that the Center would not form part of the budget and that how it would continue to function, and with what degree of effectiveness, would depend on how much funding it would receive from ASSMCA's budget for its Adult Treatment Program. Under this approach, the nature and extent of the Center's survival will depend on the degree to which the Administrator decides to sacrifice other budgeted services on its behalf. That certainly was not the message which defendants conveyed to the Court. On the contrary, it was fair for the Court to conclude that the complex of programs which make up San Patricio's services would be fully budgeted in order to insure that it would continue to function as one of the essential parts of the network of pre and post mental health facilities needed to prevent overcrowding in the Hospital and thus keep it, in the words of the Court, "deinstitutionalized and constitutionally healthy."

The budgetary treatment accorded the San Patricio Center reflects a clash of two public policies and an effort at an improvised solution. As noted earlier, the first policy position of OMB was to eliminate the Center entirely. The budget presented to the House of Representatives on May 6, 2003, speaks of a report issued by OMB on January 30 of this year, which called for the "restructuring of ASSMCA", a process to be worked out by Price Waterhouse Coopers, which would effectively transfer to MBHO "significant portion of the mental health ambulatory

services" which have until the present been ASSMCA's responsibility[6]. Under this policy, ASSMCA would largely be restricted to licensing and evaluating functions and many of its ambulatory responsibilities would be undertaken by MBHO's. In seeking to implement the new policy, OMB eliminated San Patricio because it would no longer have responsibility for providing ambulatory mental health services. Faced with the Court's decision to convene a Status Conference, OMB backtracked partially: it would no longer require the demise of San Patricio, but would still deny it a place in the budget, leaving it to ASSMCA's Administrator to decide how much she was prepared to sacrifice other programs to keep it alive. What OMB has contrived is at best an improvised solution which satisfies neither its policy of restructuring ASSMCA, nor mental health policy embodied in the January 28, 2002 Order. There is an evident clash between the two policies which is for the Court to resolve. The issue to be addressed is whether the Commonwealth Government has the authority to dismantle the network of pre and post facilities which have been developed to keep the Hospital deinstitutionalized, by substituting for the network private MBHO's under contract to ASES? Alternatively, the issue can be stated as one of compliance: Under the terms of the January 28, 2002 Order, are defendants obligated to provided [sic] the San Patricio Center with a budget sufficient in scope for it to continue to implement its program of mental health services?

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[6] See OMB's statement in "Memorial Explicativo – Para el Presupuesto de Gastos de Funcionamiento", Fiscal Year 2003-2004, submitted to the House of Representatives, May 6, 2003, pp. 2-3.

Turning again to the Hospital's budgetary situation, is there evidence of non-compliance with Court Orders? I start from the premise that the fact that there is an official document which assigns the Hospital 18.929 million is not proof that it has genuine access to those funds. One way to determine whether there is full-fledged and exclusive access would be to examine an audit of expenditures made under the budget. In the absence of an audited account, a second method would be to inquire whether the Hospital has been able to fill personnel vacancies to maintain its staffing pattern, and to arrange for the full flow of supplies, materials, equipment and services needed to assure effective and efficient programs of mental health services. In this investigation, an enormous amount of evidence has been collected to demonstrate that the Hospital is seriously suffering from insufficiency of funding which is reflected in the large number of unfilled requisitions and personnel vacancies.

This evidence is examined in the next section of this report, as well as the consequences of insufficient funding. The lack of funds, by itself, does not prove that the Hospital has not had full and exclusive access to the 18.929 million budget. There is however circumstantial evidence, which in my opinion is very strong, that the Hospital has in fact not had full access to its official budget: in earlier years, for example in 1996, proof that the Hospital had access to the 18.929 million budget was the way it was operating. It had in that year a staffing pattern of sixteen psychiatrists dealing with hospitalized patients, a census well over 50% of the current number, a regular and unfailing flow of medications, as well as all necessary supplies and services, including needed transportation facilities. At present, with a staff of only five psychiatrists, serving a

patient population of only 100, the Hospital finds itself without the funding needed to comply adequately with the commitments it has to public mental health services. The explanation given by ASSMCA officials to Hospital officials and to all personnel, when denying requisitions is that there are no funds. The question which needs answering is why were there sufficient funds in 1996 and why in contrast present funding is so insufficient, when in both years the budget has been essentially the same? It was this precise question which would have been at the heart of the scheduled interview with Administrator Aguilu and her budgetary and financial team on May 22, when attorney, del Valle decided to short circuit the Court-ordered investigation. There is still much to be investigated to answer fully the question posed at the outset of this section of the report: Are defendants' budgetary decisions in compliance with Court Orders and their own stipulated commitments?

IV. Are Defendants Maintaining the Rio Piedras Psychiatric Hospital and the San Patricio Mental Health Center in Compliance with Court Orders and Their Own Commitments?

Since March of this year, there has been an outpouring of letters and documents of all kinds, sent to the Court and to me in the course of this investigation, which taken as a whole, in my opinion require a negative answer to the captioned question. This does not mean that every allegation in the investigation turned out to be credible or based on reliable evidence. The range has been from untrue allegations at one extreme to verifiable information which merits full acceptance. The significant point is that most of what has been alleged has been confirmed in large measure to be true. One allegation which has proved to be false

was the communication to the Court that the draft of the letter-contract between BHP and ASSMCA's Administrator had been signed and implemented before being reviewed and approved by the Court. Another example of unreliable allegations are anonymous letters sent by employees of ASSMCA's mental health services and by families, unless of course they are corroborated by reliable evidence from another source. But to repeat, most of the material sent to the Court and which I received during the investigation is, in my opinion, entirely trustworthy.

Trustworthyness [sic] can relate to at least two types of testimony: factual matters and matters of opinion. An example of the first type is that everyone interviewed in this case recounted how often needed requisitions had been denied with the response from ASSMCA that there were no funds. This was so whether the information was supplied by the Hospital's Executive Director, or the Medical Director, or the Medical Faculty, or professional and non-professional directors, all without a single exception. The truth of the matter was reinforced when after having made such oral allegations, many submitted written reports in support of their oral testimony. Under such conditions, the denial of needed requisitions in large numbers, justified by the response of lack of funds, can safely be accepted as a fact. But to eliminate all doubt, I requested Acting Executive Director Cabrera to collect all requisitions for the past six months in order to check the scope and depth of the problem of denied requisitions for want of funds. By order of attorney del Valle this information was denied to me and therefor still needs to be evaluated. In contrast, the denied requisitions of the San Patricio Center were collected and delivered to me so that the seriousness of the impact of denied material and the failure to fill vacancies can be duly assessed.

In contrast, the trustworthiness of an opinion, especially that of a professional, depends on his or her qualifications, the basis of the opinion rendered and the possible impact of personal motivation. To illustrate with a concrete example, when Dr. Rodriguez Llauger states that in his opinion the Emergency Room is not functioning effectively because of lack of psychiatric personnel, among others, his opinion should be accepted, if well reasoned, and if there is no basis for concluding that his opinion is not his best judgment on the matter. His opinion becomes even more trustworthy if it has the concurrence of the psychiatrist who is working in the Emergency Room. And it becomes well nigh undebatable if confirmed after an inspection by an outside recognized authority who in no way is part of the Hospital's medical staff.[7]

Prior to considering in detail data on the denial of needed personnel and materials and services of all kinds, attention should be paid to the question of institutional morale. Employee morale, though intangible, can be evaluated and without doubt is one of the essential factors in determining the effectiveness of any system of mental health services. On the positive side, I was impressed by the dedication of almost all of the many employees interviewed, professionals and non-professionals alike, notwithstanding working conditions which theyconsidered [sic] to be antithetical to sound standards for providing

[7] This is precisely what took place during the course of this investigation: all three psychiatrists agreed in their diagnosis of what was wrong about how the Emergency Room was functioning and on what remedies were needed. The outside expert opinion was prepared by Dr. Nectar Torregrosa and is included in Appendix C.

mental health services. At the same time their morale was very low due to their frustration at not being able to convince those in authority to correct deficiencies caused by the denial of needed personnel, supplies and services. Their complaints were not limited entirely to inadequate funding, but most of the frustration and lack of hope they have been experiencing can be traced to the failure of the budget to provide what is needed. It is no exaggeration to describe the emotional state of many employees as one of desperation.

Feelings of that kind account for a phenomenon which is in my experience very rare: professionals and non-professionals, after having failed to impress those in authority to take remedial action, have appealed in large numbers to the Court for relief. For example, 184 employees of the Hospital submitted a petition, with their signatures, and defined their working situation as one of "Chaos".[8] Another petition to the Court, signed on behalf of 50 employees of the San Patricio Mental Health Center, sounds a desperate note over how BHP has negatively impacted the Center and over whether it will survive.[9] A third example is a letter from a group [of] Rehabilitation Advisors who are fearful that under a restructured ASSMCA there will be no place for the rehabilitation services

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[8] See Appendix D.

[9] See Appendix E.

needed by mental patients.[10] Additional examples are considered later in this report.[11]

At my request the Hospital's Medical Director, Dr. Reynaldo Rodriguez Llauger, prepared a report giving his evaluation of how the Hospital was functioning. The report is entitled: "Summarized Status of Situation Report", copies of which were also delivered to Dr. Rullan, Dr. Aguilu and attorney del Valle. In my opinion, the report analyzes in a realistic and forthright way, the principal clinical and support services of the Hospital and offers solutions to its many problems. It contains the following topics: "Executive Summary – Strategic Overview – Specific Areas of Needs (Psychiatric Emergency Room (CCEP), Center of Extended Observation (COE), Psychiatric Intensive Care Unit (PICU), Faculty, Nursing, Social Workers, Occupational and Recreational Therapist, Pharmacy, Hospital Vehicles and Drivers, Utilization Department), The BHP Proposal and Conclusion."[12] This is the report's "Executive Summary":

> The State Psychiatric Hospital is currently confronting one of the most severe crisis in its history. The main common denominator for all the different components of the present situation is

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[10] See Appendix F.

[11] It should be noted that the Court has received numerous communications and petitions outside the catchment area covered by the *Navarro Ayala* case which therefor are not within its jurisdiction. One such petition, signed by 125 family members of mental patients from the western region of Puerto Rico, complained about the abysmal treatment they were receiving from MBHO's in violation of the Mental Patient's Bill of Rights. See Appendix G.

[12] The complete report is included in Appendix H-H-1-12.

> funding, or lack of it to be precise. The inability of the responsible programs due to a generalized shortage of adequate facilities for the long-term placement of patients that have reached maximum benefit, is literally risking the long-term survival of the Hospital as an acute care facility. The Hospital has undergone, with certain success an under-declared downsize of the overall operation in order to cope and override the present crisis. Those areas of the hospital that are exposed to an ever increasing demand for services have survived only thanks to the spirit of service of the staff involved, examples of such areas are pharmacy and CCEP. Conversely, the potential capacity of the hospital to generate a significant amount of its budgetary needs has remained for all practical purpose untapped. Finally, there appears to be no justifiable explanation for the present situation, at least based on the legal and budgetary dispositions that are supposed to protect the hospital's budget.

Without investigating every area and service, the deterioration of services offered by the Hospital is manifest from examination of a number of basic statistics. Thus, the number of new admissions dropped from 126 in July of 2001 to 66 in April of 2003.[13] In April of this year, in one third of the month the census of CCEP-COE was greater than 26 which resulted in overcrowding and the need for patients to sleep on mattresses on the floor.[14] The statistical data provides a picture of critical trends: comparing

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[13] See Appendix I-1-1. All statistics cited are taken from the official records of the Hospital.

[14] See Appendix J.

fiscal 2000-01 with fiscal 2001-02, there was decline in admissions in the later year, hospital stays were longer, there were less discharges, the average stay was greater, the average census of patients dropped, and the number of patient days declined.[15] It is of the greatest significance that these trends seem to be worsening up to the present.[16] The most telling statistic is the comparison between the potential and actual utilization of hospital beds. The Hospital could be operating with 150 beds, but is limited to 100 beds, because at present it is functioning with only five psychiatrists rather than the eight which should be servicing the eight Hospital wards.

The statistic directly related to constitutional standards has to do with the extent to which there has been allowed to accumulate the number of patients who have received the maximum benefits of hospitalization, but who have been retained because there [are] no places in the system of "Hogares" to receive them. The number of such patients, I have been informed, amounts to 40. Their retention is both a constitutional violation and a failure of compliance with Court Orders. The problem is specifically recognized as critical by the Medical Director of the Hospital: "If the hospital is to remain an acute care facility it is imperative to find a solution for the disposition of patients that have received maximum therapeutic benefit." (App. H-12)

Perhaps the most significant negative impact on quality of service took effect in April of 2002, when the Medical Director felt compelled to introduce the new model of

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[15] See Appendix K-K1-6.

[16] See Appendix K-K- 7-9.

rotation of teams by wards, the teams consisting of a psychiatrist, clinical doctor, psychologist and social worker, due to the fact that there were only five psychiatrists to cover eight wards. Under the former system when there were eight psychiatrists available, one for each of the eight wards, it was possible to effectuate effective interdisciplinary treatment because each ward had a team consisting of a psychiatrist, medical clinician, psychologist, social worker, occupational therapist, recreational therapist and nurses.[17] In the opinion of the professionals affected, the rotation model is distinctly inferior to the former interdisciplinary approach to mental health treatment. The case against the rotation model has been effectively expressed by the Hospital's social workers, but to no avail.[18] All professionals concerned who were interviewed seemed to be in accord that the interdisciplinary system of treatment should and would be reinstated, were it possible to have a full complement of eight psychiatrists once again.

The Medical Director's critique of the state of affairs in the Hospital is supported in the issues which the Medical Faculty have raised. In its February 14, 2002 report to the Hospital's Board of Governors, the Medical Faculty, among other problems, reported that by the end of the month there would be two psychiatric positions vacant, as well as the position of director of CCEP and, the Coordinator of Psychiatric Services; one year later, it was complaining of the negative impact of dealing with BHP patients, the lack of generally used medicines, shortage of nurses, difficulty

[17] Appendix L-L-7 includes the schedules for implementing the system of rotation.

[18] See Appendix M-M-3.

in placement of discharged patients and the lack of ambulance services.[19] By the end of April of this year, the sense of urgency about the Hospital's problems had increased markedly and this was reflected in a detailed petition which the Medical Faculty sent to Administrator Aguilu and which represented its unanimous position.[20] The petition begins with the statement that compared with the recent past the Hospital's medical staff is experiencing a sense of "collective frustration". It then goes on to list concrete problems which have remained unresolved, notwithstanding the fact that they have been brought to the attention of those in authority: the scarcity of medicines, scarcity of basic hygienic materials, scarcity of nursing services, inadequate and at times non-existent transportation services for patients, needed requisitions rejected regularly with the justification that there are no funds and, from the purely medical perspective, the shortage of psychiatrists which requires that five psychiatrists must serve eight wards. The petition closes with this prayer for relief:

> Many of us were working when these matters were not problems. We lived in a Hospital with a complete faculty, a positive and professional environment. We believe that it is imperative that the agency adopt measures to correct what we

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[19] See Appendix N-N-3.

[20] The entire petition of the Medical Faculty is reprinted in Appendix O-O1-2. It should be noted that two days prior to the petition the Medical Faculty's President brought to the attention of the Hospital's Executive Director the fact the pharmacy was entirely out of three essential medicines used in the treatment of patients. See Appendix O-3.

> have exposed, to raise the hopes of we few who remain that things are going to improve.

ASSMCA's Administrator did meet with the Medical Faculty to discuss the petition, but without corrective action being promised. I have been reliably informed that the explanation received by the Medical Faculty was that no funds were available. Following that meeting, the petition was sent to the Court.

The meetings held with the directors of the different professional departments – psychology, social work, occupational therapy, recreational therapy and nursing – as well as of all support services, substantiated the positions of the Medical Director and that of the Medical Faculty, and provided the investigation with concrete details of requisitions which were denied or postponed interminably. In particular, all confirmed that denied requests for materials and services had been justified with the response that there were no funds.[21]

In summary, to the question of whether conditions in the Hospital are consistent with compliance with the January 28, 2002 Order, only a negative answer is possible. But the seriousness of the deterioration is not limited to non-compliance with court orders and constitutional standards. If these conditions are allowed to persist, the Hospital's accreditations also would be in danger of being lost. The conclusion is inescapable: an expedited plan of

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[21] Following the meetings there have been a number of written statements, confirming and amplifying the oral testimony, but since most were submitted anonymously, they have not been made part of the investigative record.

action is required to restore the Hospital to the full compliance it had achieved a few short years ago.

> To close this part of the report, there should be considered findings related to compliance questions at the San Patricio Mental Health Center and the Trujillo Alto "Sicosocial". Both were among the earliest facilities to convey to the Court their concern about how the restructuring of ASSMCA would affect the quality of mental health service. An interdisciplinary professional group from the San Patricio Center in particular submitted a detailed analysis comparing BHP procedures with the interdisciplinary approach which had been followed for years in the Center. Their analysis advocates complete return to the latter. This too is the position taken by the employees of the "Sicosocial". The merits of their position will be addressed in a later report.[22] In this report the focus is on the consequences of budgetary inadequacies. As noted earlier, the San Patricio Center has no official budget: the extent to which it will function true to its program of services will depend entirely on how much ASSMCA's Administrator will squeeze from the agency's budget.
>
> The last budget the Center was assigned was far short of the 4.5 million needed to fully effectuate the multiple programs it was created to implement. Whatever may have been its formal budget this year, it was clearly inadequate to judge from

[22] Their report is included in Appendix P-P-1-5. Since BHP's contract has been rescinded by ASES, it will be APS which will have the right to respond to the Center Group's analysis.

the number of its requisitions returned unfilled from ASSMCA.[23] Both facilities report a pattern of conduct which is identical to the experience of the Hospital: requisitions denied for lack of funds and professional and non-professional vacancies unfilled in the staffing pattern. And there is the additional complaint that psychiatrists in interdisciplinary programs have been dismissed and replaced with the limited services provided by MBHO psychiatrists. This was, for example, the protest of one interdisciplinary team serving the residents of the Rio Piedras "Hogares".[24]

In fairness to ASSMCA and its Administrator, it should be recognized that the agency has had to operate under severe fiscal restraints that have been imposed on almost all government entities due to inadequate tax revenues. It was for that reason that the Administrator circulated to all the agency's officials and personnel a notice which imposed strict "measures of austerity" with respect to recruitment of personnel and all types of expenditures.[25] Budgetary scarcity can explain lack of funding to the San Patricio Center, the "Sicosociales" and the "Hogares", but only up to a point. Those facilities are not in precisely the same category as the Hospital which is guaranteed a budget of 18.929 million by court

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[23] At my request the Center collected this year's unfilled requisitions. They number in the hundreds and fill a thick folder. The Center's Director could not inform me of how much the budget amount[ed] to. It appears to be a fact that the Center is not informed of its budget until the end of the fiscal year.

[24] See Appendix Q-Q-1

[25] The notice is dated July 12, 2001 and is incorporated in Appendix R-R-1.

orders, but they still are protected in general terms by those same court orders. Thus, the January 28, 2002 Order: "The Court finds, and still finds, that pre-and-post-Hospital support systems are essential to keep and maintain the Rio Piedras Psychiatric Hospital de-institutionalized and constitutionally healthy."

Therefor, defendants' authority to reduce ASSMCA's budget is not restricted. It cannot reduce it to such an extent that there are insufficient funds for the pre and post network of mental health facilities on which the Hospital relies for it to comply with pertinent court orders and the constitutional rights of the patients. The current problem of the large number of maximum benefit patients waiting to be placed in "Hogares" illustrates the point. Unless the necessary resources are provided, and a plan of action implemented, the Hospital will remain in non-compliance with court orders and constitutional principles.[26] The Administrator has demonstrated that she recognizes the need to resolve the problem, but there is as yet no indication that the necessary funding is to be forthcoming.[27] This is the prototype of the

[26] It should be noted, in addition, that under recent Supreme Court doctrine institutionalizing MBH patients has been considered a violation of the Americans with Disabilities Act of 1990 (ADA). See *Olmstead v. V.L.C.*, 527 U.S. 581 (1999).

[27] In response to my question about the large number of Hospital patients waiting to be discharged and transferred to one of the "Hogares", the Administrator sent me a letter in which she outlined a plan for resolving the problem. The plan is excellent, but will it prove to be doable? It is intended to go into effect July 1 and then only if OMB acts favorably on her petition for the necessary funding. The complete letter is reprinted in Appendix S-S-1.

> entire range of problems which are adversely affecting mental health services: defendants are aware of the problems, know what must be done to resolve them, but seem to lack the will to provide the needed funds. The unhappy truth seems to be that the defendants who understand and know what must be done are not necessarily the defendants who make the budgetary decision[.]

V. Conclusions and Recommendations

1. This first phase of the investigation ordered by the Court demonstrates that its concern was well grounded over the possible failures of defendants to comply with their budgetary responsibilities as mandated by Court Orders and their own stipulated commitments. What has been surprising is the degree of deterioration in mental health services which has been found to exist.

2. There is strong circumstantial evidence that the Hospital in fact has not had full, expedited and meaningful access to its official budget of 18.929 million and that the consequences have been numerous noncompliances with how pertinent court orders intend the Hospital to function and in some instances there has been noncompliance with constitutional principle.

3. Defendants' attorney, Carlos del Valle, commenced to obstruct the Court's ordered investigation at the point at which the Special Master was inquiring into one of the central issues: why has the official budget been inadequate to assure the Hospital the staffing pattern and all supplies and services needed for it to comply with its mission as an acute mental treatment facility?

4. In the light of the latter three conclusions. I recommend that the Court take the following measures:

A. Order defendants and their legal representative to cease and desist from obstructing the Special Master's efforts to carry through to completion the court-ordered investigation.

B. Order defendants within ten days to file with the Court a plan to remedy the following egregious deficiencies in the Hospital and its support system: inadequate psychiatric staffing, insufficient "hogares" to accommodate patients who have received the maximum benefit of hospitalization, the uncertain and unofficial budget for the San Patricio Center, the inadequate and uncertain flow of medicines needed by the Hospital and its supporting network and the lack of needed transportation facilities. The plan should be accompanied by the necessary budget and a firm governmental commitment. It should be considered in the nature of a remedial plan to deal with a crisis of emergency proportions.

C. With the assistance of knowledgeable mental health professionals, from within and outside the government, the Court should promote the development of a plan to protect the Hospital and its support system from again becoming undermined. This will require first a readiness to diagnose why it is that the great achievement which was the establishment of an effective and caring mental health program has so quickly deteriorated. Should we continue to tolerate cycles of achievement, followed by deterioration, followed by rescue and rehabilitation efforts, repeatedly on and on, indefinitely?

Finally, I should make clear that in my opinion the best method to follow in institutional cases of this kind is one of

openness to proposed solutions and a readiness to engage in good faith collaboration. For my part, I stand ready to work with defendants toward implementing the measures which will assure the mentally ill the care and treatment to which they are entitled.

Respectfully submitted,

/s/ David M. Helfeld
David M. Helfeld
Special Master
June 4, 2003

May 19, 2003

FAX-787-765-5888

/s/ David M. Helfeld

From: Dr. David M. Helfeld, Special Master
To: Dr. Dalila Aguilú, Administrator, ASSMCA

Re: **Investigation Ordered by the Court, April 29, 2003 in the Case of *Roberto Ayala v. Governor of Puerto Rico*, Civil No. 74-1301 (HL)**

1. This is to reiterate my oral request to Dr. Aguilu to deliver to me a copy of the document drafted in the Office of Management and Budget of the Commonwealth Government which proposes that a study be undertaken to determine if the mental health services provided by BHP are being duplicated by the services under the aegis of ASSMCA. It is my understanding that the OGP document led to contracting the services of Price Waterhouse to carry out the study. Please inform me if the study is in process and, if so, in what stage is it at present.

2. In the interviews which I have carried out since beginning the investigation ordered by the Court, I have received the same information from all officials, professionals and non-professionals that requisitions, requests to fill vacancies, indeed all petitions which involve the expenditure of public funds, have been regularly denied or postponed for long periods. The reason given by ASSMCA central headquarters' officials, all informants state, is that no funds are available. If that is the case, that no funds are available, it is essential for the Court to be informed why that is so. Specifically, why has the Court-ordered budget for the Psychiatric Hospital been inadequate to fund a full staffing pattern of psychiatrists, an adequate and uninterrupted supply of medicines, supplies and equipment of all kinds and transport facilities, among other items necessary to the Hospital's effective functioning? To respond to that question, you are cited to appear at the Court's chambers Thursday, May 22, 2003, at 10.00 a.m. There should accompany you, for the purpose of supplying information on all requisitions and personnel requests which have been denied, ASSMCA officials of your selection who regularly deal with budget, finance, and the processing of requests from the Hospital and the San Patricio Mental Health Center. Your cooperation in this matter will be appreciated.

SPECIAL REPORT
by
Special Master, Dr. David M. Helfeld

In re Roberto Navarro Ayala, et al. v. Governor of Puerto Rico, et al.
Civil No. 74-1301 (HL)
October 15, 2003

(Filed Oct. 17, 2003)

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APPENDICES

A-1-4. The method for the audit and the study of the budgetary needs of the Psychiatric Hospital, by Mr. José

[28] Page and footnote numbering are a continuation of the First Report. It should be noted that, as in the First Report, all titles to positions, reports and quoted language in the Spanish original have been translated to English. The accuracy of the translations are my responsibility.

Rodríguez Bon, Director of Financial Affairs of the Commonwealth Department of Health, July 22, 2003. Proposed budgets for both the Hospital and the San Patricio Center are included.

B-1-41. Yolanda Muriel Falcon, ASSMCA's Reports to the Special Master on San Patricio's Budget, the Process for Utilizing the Reserve Account in the Custody of the Justice Department and the Income and Expenses of the Hospital for fiscal year 2002-2003, Submitted September 9, 2003.

C-1-14. Jose Rodriguez Bon, Fiscal Situation of the Psychiatric Hospital, Fiscal Year 2002-2003 and Budgets for the Hospital and the San Patricio Center, Submitted October 3, 2003.

D-1-2. Special Master to Secretary of Justice requesting information on the Hospital's special account in the Department's custody, July 29 and August 11, 2003.

E-1-2. Special Master to Director of OMB related to budgetary decisions affecting the Hospital and the San Patricio Center, July 29 and August 11, 2003.

F-1-6. Carlos Del Valle, Esq. to special master re management by the Justice Department of the special eight million account of the Hospital, August 18, 2003.

G-1-4. OMB Director to Special Master re budgetary decisions related to the Hospital and the San Patricio Center, August 8 and 22, 2003.

H-1-9. Lcdo. Rafael Garcia Alvarez and Ms. Angeles M. Guerrero to special master re additional budget needed by the Hospital, September 15, 2003.

I-1-54. Dr. Nectar Torregrosa to special master, Comparison of the Situation in 1997 Compared with the Present Situation in the Rio Piedras Psychiatric Hospital and the Mental Health Center of San Patricio, September of 2003.

J-1-2. Special Master to the Secretary of Health, "Proposed Procedures and Principles, Themes to Be Addressed and Time Frame for the Working Relationship Between the Secretary's Task Force and the Special Master's Group", June 24, 2003.

K-1-3. Dr. Elena Batista, "Agreement and Principles of Work", July 15, 2003.

L-1-30. Professional Resumes of the Members of Joint Task Force Appointed by the Secretary.

M-1-31. Dr. Nectar Torregrosa, Dr. Reynaldo Rodriguez Llauguer and Lcda. Rita Rodriguez Falciana, "The System of Mental Health Services, September 3, 2003.

N-1-54. "Report of the Task Force on Public Policy Related to the Mental Health Care System", submitted to ASSMCA's Administrator, June 20, 2003.

O-1-3. Report of the Hospital's Executive Director on the requisitions denied by ASSMCA for lack of funds during fiscal 2002-2003.

P-1-36. Dr. Elena Batista, Workshop on the Vision, Mission and Values to Guide the Hospital's Future, September 27, 2003.

Q-1-5. Ms. Rita Cordova Campos to Special Master, Case History of a Mental Health Patient, July 3, 2003.

R-1-6. Mr. Pedro del Cuadro to Special Master, Conditions at the Psych-Social of Cayey, August 12, 2003. Appendix "R" also includes letters to ASSMCA's Administrator and Chief Judge Hector M. Laffitte.

S-1-5. Dr. Torregrosa, Report on the Conditions of the Hospital's Emergency Rooms, May 15, 2003.

T-1-24. Lcdo. Garcia Alvarez, Executive Director, Report to Psychiatric Task Force, July 22, 2003.

U-1-3. Lcdo. Garcia Alvarez, Executive Director, Second Report to Psychiatric Task Force, August 25, 2003.

V-1-4. Psychiatric Hospital, Work Plan Update, August 26, 2003.

W-1-6. Dr. Rodriguez Llauger, Medical Director, Utilization Report, for the Month of July.

X-1-9. Dr. Torregrosa, Resume of Visit to San Patricio Center, 7-3-03.

Y-1-6. Dr. Torregrosa, Visit to Trujillo Alto Psycho-Social, 7-16-03.

Z-1-6. Dr. Torregrosa, Visit to Cayey Psycho-Social, 7-17-03.

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October 15, 2003

Hon. Hector M. Laffitte
Chief Judge
United States District Court
For the District of Puerto Rico
San Juan, Puerto Rico

Dear Sir:

I have the honor to present my second report as special master in compliance with the Court's April 29, 2003 Order, in the case of *Roberto Navarro Ayala v. Governor of Puerto Rico*, Civil No. 74-1301 (HL), covering the period June 5 until October 10, 2003. May, June, July and August have been litigious months given over to motions, appeals and orders both involving the Court and the Circuit Court of Appeals and which have consumed the time and attention of the courts, counsel for the parties and the special master. This body of litigious material will only be referred to when directly relevant to substantive issues which are related to the Court's assignment to the special master to investigate the financial problems and consequent deterioration in the mental health services of the Rio Piedras Psychiatric Hospital and the San Patricio Mental Health Center.

The most positive news to report is that the budgets for the present fiscal year, 2003-2004, for both the Hospital and the San Patricio Center have been appreciably increased and what remains to be determined is whether the increases will prove to be sufficient to assure compliance

with the Court's Orders. The Hospital's budget from all sources at present amounts to $21.429 millions and the San Patricio Center's overall budget now amounts to $5.557 millions.

This report covers three principal themes: first, the continuing efforts which have been made to answer why the operating budgets of the Hospital and the San Patricio Center have been insufficient to insure that both institutions function at the level which the Court's relevant Orders require; second, an account of what has been proposed by the Joint Task Force, consisting of specialized professionals appointed by the Secretary of Health and the Special Master's two-member group[29], consisting of himself and Dr. Nector Torregrosa, and of what has been adopted and implemented by the Secretary as executive decisions intended to restore both institutions to their former level of effectiveness and thus comply with all relevant Court Orders; third, a summary of the special master's evaluation on the progress made during the period under review.

Besides the appreciable budget increases for the Hospital and the San Patricio Center, the most significant achievement made during these past four months, as a result of the discussions in the meetings of the Joint Task Force and, as well, discussions between the Secretary of Health and the special master, is consensus on the agenda of what must be accomplished by December of this year to satisfy the Court that there is full compliance with its pertinent orders and that the condition of compliance is

[29] In August the Master recruited an additional staff member to serve as administrative assistant, Ms. Olga L. Villalón Soler.

likely to continue on into the future. There is first the diagnostic question: what accounts for the deterioration in services since the hospital was accredited for the second time in 2000? Second, a working plan to remedy identified deficiencies must be formulated and implemented. The remedial plan cannot be limited to the Hospital alone because it is recognized that compliance with the Court's Order of January 28, 2002 requires that is pre and post support system be maintained at sufficient levels to permit the Hospital to comply. Third, there must be left in place an institutional structure that maximizes the likelihood that there will be continuing compliance on into the future, as the best hope that there will be no future need for the federal court to intervene to protect the constitutional rights of the mental health patients serviced by the Psychiatric Hospital.

Instead of following the procedure of first submitting a draft of my report to the parties, permitting them to comment and to make suggestions, prior to transmitting the report to the Court, I have chosen to exercise the discretion which the terms of reference of my appointment authorizes: "the Master may submit special reports to the Court and the parties at any time." There are two reasons to justify my following the more expedited procedure. First, the Court has set December 31 of this year as a viable date for terminating the mastership, leaving little margin of time to follow the more time-consuming procedure of submitting a draft to receive suggestions of the parties. Second, also involving the pressure of time to achieve compliance, is the fact that there still needs to be resolved the question of what should be the budget in the case of both the Hospital and the Sun Patricio Center.

Respectfully submitted by:

/s/ David M. Helfeld
David M. Helfeld
Special Master

Copies to:
Carlos Del Valle, Esq.
Carlos Garcia Gutiérrez, Esq.
Dr. Johnny Rullán, Hon. Commonwealth Secretary of Health

UNITED [sic] DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

Roberto Ayala Navarro, et al.	*	
Plaintiffs	*	
v.	*	Civil No. 74-1301 (HL)
Governor of Puerto Rico, et al.	*	
Defendants	*	

Special Master's Second Report for the Period June 5 – October 10, 2003

A. Budgetary Questions Answered and Still to Be Resolved

1. The Hospital and San Patricio Center Budgets

Due to the obstruction interposed by Defendants' counsel, the Special Master's first report concluded that it was not possible to determine whether the Hospital had received full and exclusive use of its formally allotted 18.9 millions, as required by the Court's January 28,

2002 Order. On the basis of the unanimous testimony of all informants, whether Defendant officials or their employees, the report did conclude that innumerable requisitions had been returned to the Hospital from ASSMCA with the statement that no funds were available. The same explanation was given for not permitting vacancies to be filled. As a consequence there was overwhelming testimony of shortages of supplies and materials fundamental to the acceptable functioning of the Hospital, as well as testimony on the deleterious impact of below par staffing patterns, especially with respect to the insufficient number of psychiatrists. The report found the same conditions to apply to the operations of the San Patricio Mental Health Center.

In the June 17, 2003 Status Conference, Defendants presented as proof that the Hospital had received the complete benefits of its 18.9 million budget for fiscal year 2002-2003, a document entitled "Projected Estimate of Income and Expenses". In my response to the document, one of a number [sic] responses made to a prior motion of Defendants, in compliance with the Court's Order of June 26, 2003, I expressed doubts about whether the document constituted reliable or irrefutable evidence. These were my reasons:

> "It is true that in the Status Conference ASSMCA officials vouched for the entire accuracy of the Projected Estimate of Income and Expenses, but that does not constitute proof that the Hospital in fact had access to and used the entire 18.929 millions or whether part of those funds were in fact siphoned off for expenses having nothing to to do with the Hospital, in violation of Court Orders. The measure of the trustworthiness of the projected estimate can only be

> determined through a complete audit which precisely is being undertaken at this time under the auspices of the Secretary of Health. Even prior to an audit being started, there were indicia that the projected estimate did not entirely demonstrate full compliance with Court Orders. For example at page 38 of the projected estimate there is the position of "Gerente Centro de Qimioterapia" with a salary of $51,232.98, a position which does not form part of the Hospital's staff. A second example at page 2 needs explanation: it states that there are a total of eleven positions for psychiatrists at a cost of $1,013,652, but the record is clear that the Hospital for a good part of fiscal year 2002-2003 has been functioning with five psychiatrists in eight wards and two in the Emegency [sic] Wards. Furthermore, the record is also clear that efforts by the Medical Director were unavailing to recruit needed psychiatrists to reach the minimum staffing pattern for eight interdisciplinary teams. Under these conditions the appropriate status of the projected estimate is that of a document whose reliability is yet to [sic] determined."

Whether the projected estimate truly reflects funds totally made available to the Hospital is a questions [sic] which was left to be answered in the audit conducted by instructions of the Secretary of Health, who at present also is responsible for directing ASSMCA until such time as a new Administrator is appointed. The Secretary assigned responsibility for the audit to Mr. Jose Rodriguez Bon, Director of the Office of Fiscal Affairs of the Department of Health. His method for executing his assignment is spelled

out in Appendix "A". In addition, an audit was undertaken by Ms. Yolanda Muriel[30], a specialist in budget and finance on the staff of ASSMCA and an audit of the funds under custody of the Commonwealth's Justice Department was also promised.[31]

The reports of Ms. Muriel, the Justice Department and Mr. Rodriguez Bon[32] are intended to answer the following questions. Did ASSMCA make exclusively available to the Hospital the official budgeted amount of 18.9 millions, as well as the Medicare and other income it earned, or were some of those funds used to cover non-Hospital expenses and, if so, to what extent? If in fact ASSMCA has complied with the Court's Order, what should the budget be to assure that the Hospital will function at the level which the Court's January 28, 2002 Order intended and which represented the intent of the parties? The answers to both questions are crucial to restoring it to its former status of full compliance with the Court's Orders. That is because any remedial plan must be grounded on knowledge of why the Hospital and the San Patricio Center were short of having their essential needs adequately met.[33]

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[30] Her methodology is spelled out in a report she filed September 9, 2003. In her report, the initial Projected Estimate is withdrawn and substituted by actual income and expenses incurred in fiscal 2002-2003. See App. "B".

[31] For the report of attorney Del Valle, see *infra* note 36.

[32] Mr. Rodriguez Bon's audit and report were filed October 3, 2003. See App. "C".

[33] In the case of San Patricio the explanation is entirely straightforward: a completely inadequate budget. For its eight programs of service in 1997 it had a budget of 4.5 millions, in contrast to 2.9 millions during fiscal 2002-2003. The only open question is whether its

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2. The Ten Million Dollar Account in the Department of Justice

On July 29, 2003 I wrote to the Hon. Annabele Rodriguez, Secretary of Justice of the Commonwealth of Puerto Rico, with the following request: "That the Secretary of Justice authorize that the Special Master be informed of how the ten million dollar account of the Rio Piedras Psychiatric Hospital, under control of the Department of Justice, has been administered".[34] The ten million dollar account was first brought to my attention in an interview I held with Ms. Linda Navedo who works in the Civil Rights Division under the supervision of attorney Carlos Del Valle. It was mentioned for the second time in the June 17 Status Conference. I asked Ms. Navedo about the status of an audit of the ten million account which she had indicated she was making in the earlier interview and whether she could make available a copy to me. She responded in the affirmative, but explained that it would require the approval of her supervisor, attorney Del Valle. To the question of the Court whether it had his approval, Del Valle responded that he would have to consult the Secretary of Justice. Having heard nothing about the matter, I considered it appropriate to directly request her authorization and, as well, to request that she authorize Ms. Navedo and attorney Del Valle to make available to me an account of how the ten millions are actually administered

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present budget of 5.557 millions is adequate to fully implement its eight programs of service.

[34] The request was repeated on August 11, 2003. The faxed communications are reprinted in Appendix "D".

and to make themselves available to me for questioning on the same matter.

The reason for requesting that the information be made available to the Court ordered investigation is obvious: it is essential to learn what role, if any, the ten million account plays in satisfying the operational needs of the Hospital. In particular, it is essential to verify whether the account was available to satisfy the requisitions which were denied for lack of funds during fiscal 2002-2003 and to fill the vacancies in the position of psychiatrist and other needed personnel. There is an additional and fundamental reason for clarifying how this account works: the remedial plan for which the Secretary of Health is responsible must take into consideration how the ten million account under the aegis of the Secretary of Justice functions and whether its retention would be advisable.

3. Budgetary Decisions by the Office of Management and Budget

For similar reasons requests were made to the Hon. Melba Acosta, Director of the Office of Management and Budget, for "information related to OMB decisions with reference to budgetary determinations affecting the Rio Piedras Psychiatric Hospital and the San Patricio Mental Health Center".[35] It should be remembered that the original cause for the Court's intervention was learning that OMB had recommended a budget for the Hospital two millions less than the 18.9 millions required by Court Order and that

[35] The faxed communications, dated July 29, 2003 and August 11, 2003, are reprinted in Appendix "E".

the budget for the San Patricio Center had been eliminated altogether. These are the questions which were put to the Director of OMB. What is the source of the one million which "OGB maintains under its custody" which "will be transferred to cover the expenses" of the Hospital and which will assure it of 18.9 millions? Though the San Patricio Center was allowed to continue functioning, why wasn't it allotted a specific budget? Finally, a copy of the Price Waterhouse Cooper report was requested and all relevant information on government policy on how services are to be provided ambulatory mental health patients, whether through MBHO's, public institutions, or some combination of both. This information is especially relevant to determine whether there is a possible conflict with providing the pre and post mental health services which are essential to assuring compliance with the Court's January 28, 2002 Order.

4. The Hospital's Access to the Eight Million Account in the Custody of the Justice Department

On August 18, 2003 attorney Carlos Del Valle, on behalf of the Secretary of Justice responded to my second request for information.[36] First, he stated that the account under custody of the Department of Justice amounted to eight million and not the ten million which Ms. Linda Navedo had declared to be the amount of the account. ASSMCA's officials have confirmed that the correct figure is eight millions which they received annually from the account

[36] For his report, see Appendix "F".

and which is therefor accepted as correct.[37] Second, the report describes how the special account is handled: trimester request for release of funds are requested by ASSMCA to satisfy the operational needs of the Hospital, operational needs which have their origin in the Hospital; the requests are supported by documents justifying the release of funds; the Department of Justice then certifies to the Office of Management and Budget that the requested funds are to be used to satisfy the requirements of the *Navarro Ayala* case; whereupon OMB orders the release of the funds to ASSMCA which, in turn, authorizes the use of the funds to cover the Hospital's expenses of operation.

Attorney Del Valle states in his report that there is nothing in the Department's records which indicates by whose authority this budgetary system was authorized. It was not authorized by the Court. Apparently it was done at some time during the prior administration on the basis of an internal understanding of the government. The system should obviously be reconsidered for three basic reasons. There is first the factor of competence. There is no reason to suppose that either the Justice Department or OMB have any special competence to evaluate the requisitions of the Hospital. Second, is the factor of timeliness. This

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[37] It is inexplicable the [sic] Ms. Navedo should not have been aware of the precise amount in the special account which she had been managing for many years. It should also be noted that attorney Del Valle did mention in his report that the Justice Department was managing other accounts, but failed to specify that it was managing a special account of 6.440 millions per year for rehabilitation and transitional services provided by ASSMCA for the "Hogares" which are a component of the Hospital's post support system. See Appendix "B" re the latter account.

system is calculated to insure inordinate delay and therefor [sic] to result in unnecessary inefficiencies. Third, to assure that budgeted funds are used as intended, accounting and auditing measures can be put in place that will safeguard the proper use of the Hospital's funds without sacrificing efficiency in its operations. It is simply an error of judgement to use the *Navarro Ayala* case to justify the present system of custodial control over the Hospital's budgetary expenditures.

Finally, the report states that the audit in process covers the two past fiscal years: 2001-2002 and 2002-2003. A copy should be made available to the Court, since the content of the audit is not included in the report of Mr. Rodriguez Bon and it may throw additional light on how the Hospital's budget has been spent.

5. The Final Response of the Office of Management and Budget

In response to my second inquiry, OMB's August 8, 2003 report provided the following data on the final allocation of fiscal year 2003-2004 budgets for the Hospital and the San Patricio Center:

1. From the original recommended budget of $16.631 millions for the Hospital and zero for the San Patricio Center, OMB has approved for the Hospital a budget of $21.429 millions and a budget of $3.960 millions for the San Patricio Center.[38]

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[38] See Appendix "G" which also includes a breakdown of ASSMCA's entire operational budget for fiscal 2003-2004.

2. The breakdown of the Hospital's budget includes $19.9 millions from the General fund, which is an increase of one million over the $18.9 [sic] required by the Court's Order, plus $1.429 [sic] which is ASSMCA's estimate of what will be earned from clients of the Hospital (Medicare and MBHO patients). These figures were slightly altered in a subsequent letter from OMB which states that the amount from the General Fund is to be $19.920 millions and other income is estimated to be $1.5 millions.[39]

3. OMB's August 8 report seeks to clarify that it never intended to eliminate the San Patricio Center, only to include its needs within a larger category of ASSMCA's budget for ambulatory patients, and that at the insistence of ASSMCA, and to satisfy the concerns of the Court, the San Patricio Center was again provided with its own separate budget as had been the practice in prior years. The amount approved for fiscal 2003-2004 was $3.9 millions.

No explanation was given on how OMB arrived at this amount. It should be noted that San Patricio's budget for fiscal 2002-2003 was $2.9 millions, well below its budget in

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[39] OMB's informative letter of August 22, 2003 is attached as an addendum to App. "G". The letter also includes a puzzling fact: in fiscal 2001 the Hospital's approved budget amounted to $18.929 [sic], but it only had expenditures of $17.172 millions. No explanation is given for why the Hospital failed to spend its entire budget. In light of the findings of deterioration in the level of services brought out in the special master's first report, it is probable that the deterioration had begun to take effect in fiscal 2001. From ASSMCA's budgetary report for fiscal 2002-2003, *infra* note 30, it is clear that the Hospital could not have functioned in full compliance with the Court's Orders with expenditures of only $17.172 millions.

fiscal 1996-1997 of $4.5 millions. It should also be noted that in the June 17, 2003 Status Conference the Secretary of Health pledged to the Court that San Patricio would have a budget of $4.5 millions in the present fiscal year.

Since San Patricio's budget has been separately reinstalled in ASSMCA's budget, in accordance with past practice, and at a level greater than its former highest budget, I decided to desist from further insistence on receiving a copy of the Price, Waterhouse and Cooper report. That report supposedly recommended the elimination of the San Patricio Center on the ground that it was duplicating the ambulatory services being provided by MGHO's. Since the Secretary of Health is committed to the full restoration of San Patricio's services, whatever impact the Price, Waterhouse and Cooper report might have had on the adequacy of the Hospital's pre and post support system is no longer relevant to the Court-Ordered investigation. Why my many requests for a copy of the report were denied, will therefor remain an unanswered question.

6. In Fiscal 2002-2003 Was $18.9 Million Sufficient to Satisfy the Hospital's Expenditures?

The answer to the captioned question is that the Court-Ordered budget was clearly insufficient, as demonstrated in ASSMCA's September 9, 2003 report which was prepared by Ms. Yolanda Muriel.[40] It was prepared at my

[40] See App. "B". The report consists of three sections devoted to how the special accounts are managed, to an explanation of OMB's budgetary decisions related to the San Patricio Center and to an accounting of

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request, principally to determine how much the Hospital had actually spent during fiscal 2002-2003. From the records of the Hospital, to the extent verifiable as of June 30, 2003, the Hospital in fiscal 2002-2003 had expenses of $19.824 millions covering expenditures of payroll for employees and contracts for professional services, special fringe benefits, privatized services, utilities, materials and miscellaneous expenses.[41] That figure is almost one million more than the budget of 18.929 millions set by the Court's Order. It is reasonable to assume that OMB approved of an increase of one million in the Hospital's budget for the current fiscal year because it recognized that the Court-Ordered budget was insufficient to assure continued compliance. ASSMCA's report states that for fiscal 2002-2003 the Hospital's "budget was adjusted by ASSMCA to $19,184,515[42] in order to comply with the needs and commitments of the Hospital."

Obviously that adjustment was insufficient to cover the total amount in expenses of $19.824 millions actually incurred by the Hospital. This latter figure clearly would have been greater if the Hospital had had a budget sufficient to cover all needed but not contracted professional and other personnel, as well as the requisitions which were returned with the message that no funds were available to satisfy them. The report does state that at the

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the Hospital's income and expenditures during fiscal 2002-2003. It is this last section which is considered in this part of my report.

[41] *Id* at page 4 of the section on Income and Expenses for fiscal 2002-2003.

[42] *Id* at page 3.

close of fiscal 2002-2003 there was a surplus of $252,922,[43] but no explanation is given as to why that amount was not made available to cover recruitment and requisitions needed by the Hospital. From the perspective of the Court-Ordered investigation, the larger significance of ASSMCA's report is that it explains, by implication, why so many requisitions were returned, and personnel vacancies were not filled, with the justification that there were no funds available.

7. What Should the Hospital's Budget Be to Comply with the Court's Orders?

To respond to the captioned question, I requested that two studies be performed: one by the Director of the Office of Finances of the Health Department, Sr. Jose Rodriguez Bon, to verify the income and expenses of the Hospital for fiscal 2002-2003, to recommend how the budget should be managed in the future and to certify the budgets to be allotted for the Hospital and San Patricio for the current fiscal year[44]; and a second study to be prepared by Lcdo. Rafael Garcia Alvarez, the Hospital's Executive Director, who collaborated with Ms. Angeles M. Guerrero, Associate Director of ASSMCA, to determine what should be the budget to achieve compliance with the Court's Orders.[45]

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[43] *Id* at page 4.

[44] See Appendix "C".

[45] The study, entitled "Projected Expenses of the Rio Piedras Psychiatric Hospital for Fiscal year 2003-2004, represents the collaborative effort of Ms. Guerrero and Lcdo. Garcia Alvarez and is included in Appendix "H".

The first comment which should be made about the Rodriguez Bon study is that it differs, though not greatly from the report made by Muriel on behalf of ASSMCA. For example, for fiscal year 2002-2003 her report states that the Hospital's total expenses amounted to $19.824 millions, while his study reports the figure to be $19.555. Similarly, she reports a surplus of $252,922 and his figure is $182,733. The differences are not great and probably can be explained by minor differences in the data which formed the basic material of their respective studies. For the purposes of this Court-Ordered investigation what is significant is that both studies bear out the conclusion that a budget of $18.9 millions was insufficient to maintain the Hospital in compliance with the Court's Orders. That conclusion therefor requires that a determination be made as to what the budget should be globally and, broken down, what its component sources should be.

Rodriguez Bon's study does not deal with the question of what the budget of the Hospital should be. That question is dealt with in the study of Ms. Guerrero and Lcdo. Garcia Alvarez. According to their analysis of the projected expenses of the Hospital during the current fiscal year, it will be short by a little over two millions to cover its needs: the Hospital's budget has been approved for 21.429 millions, but expenses for all needed expenses will amount to 23.439 millions, or a shortfall of 2.10 millions.[46] The principal cause of the shortfall, in the amount of 1.691 millions, is needed to fill personnel and contractual vacancies.[47] The importance of this study to the successful

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[46] *Ibid.*

[47] *Id.* This part of the study is entitled "Minimum Additional Necessary Budget (to cover the needs of staffing patterns), Includes

(Continued on following page)

resolution of the case cannot be exaggerated. Without minimally needed funding, the Hospital will fall short of reversing and rectifying the deterioration in services and maintenance which were found in the Special Master's first report which, in turn, will defeat achieving the goal set by the Court of ending the mastership by the end of this year. To put it in a nutshell: One of the essential elements to resolving this case is a sufficient budget. It is not the only essential element, but without it the Hospital will not be able to comply with the Court's Orders. Therefor, it is incumbent on the Secretary of Health to arrange for the needed increase in funding with the government officials responsible for funding the required budgetary commitment to make compliance possible.[48]

In addition to dealing with that problem of obtaining the needed increase in the Hospital's budget, the Secretary of Health will have responsibility for determining whether to implement a series of recommendations made in the Rodriguez Bon report. In my opinion, the recommendations deserve the Secretary's full support as measures calculated to increase efficiency and effectiveness of the Hospital. These are the recommendations:[49]

Regular Positions and Contracts for Professional and Consulting Services." It is supported by a detailed analysis for all needed positions and services.

[48] Though the internal governmental budgetary discussions form no part of any public record, it is evident that during the course of this case OMB has responded positively to the efforts of the Secretary of Health to secure funding increases for both the Hospital and the San Patricio Center.

[49] See Appendix "C".

1. The Hospital's obligations as of June 30, 2003, amounting to $1,357,884, should be liquidated during the course of this fiscal year.

2. The contract for and system for providing guard duty for nurses should reviewed to assure greater economy and efficiency of service.

3. ASSMCA should initiate as soon as possible a system of detailed internal audits of its warehouses and inventory.

4. There should be established a system of perpetual inventory and the process of ordering supplies should be thoroughly improved to reflect the real needs of the Hospital.

5. Once the system of perpetual inventory is established, the system of purchasing should be set up.

6. The system of maintaining eight millions in custody of the Justice Department should be terminated in the interest of efficiency in using the Hospital's budget.

7. In accordance with Administrative Order No. 182, June 16, 2003, intended to provide the Hospital with fiscal autonomy, there has already been created the positions of Finance Director, Area of Human Resources and Purchasing Agent. This movement toward fiscal autonomy should be continued to the maximum possible extent.

8. What Should the Budget Be for the San Patricio Center?

As has been noted, for the current fiscal year the San Patricio Center has a budget of $5,557,424 which is far

greater than its budget of last year amounting to $2.9 millions and one million more than its largest budget in the past. Nonetheless, at present there is no way to be certain whether the present budget is sufficient to restore all eight programs which San Patricio was established to provide. What is needed is a programmatic budget based on the services San Patricio was providing in 1997 as the basis for determining whether this year's approved budget is sufficient. It is my understanding that is the approach the Secretary of Health intends to take.[50] How precisely San Patricio is intended to fit into the pre and post system of support for the Hospital therefor remains to be clarified.

B. The Work of the Joint Task Force and the Decisions Thus Far Taken by The Secretary of Health and His Designated Officials

As stated at the close of the Special Master's first report, maximum effective remedial results could be best achieved through a relationship of collaboration between the Master's Group and Defendants and their designated officials. In the June 17 Status Conference the Court advised the parties that it was its judgement that with cooperation it should be feasible for the Hospital to come into compliance within in a reasonable time. The Court's subsequent Order clarified that the need for a special master could end by December 31 of this year. Accordingly, I followed the

[50] Serving as benchmark is a study prepared by Dr. Nectar Torregrosa, comparing services and staffing patterns of San Patricio in 1997 with those in effect in July of 2003 and a similar comparison is made for the Hospital. The study is included in Appendix "I" and is considered in Part B *infra*.

practice of making available to the Secretary of Health all communications and information which reached me from whatever source which would assist him and his team of officials in their efforts to restore the Hospital to its former level of compliance. Since it obviously was going to take some time for all the budgetary questions to be answered, and since the target date for coming into compliance was December 31, I proposed that his Task Force, which he announced in the June 17 Status Conference, be joined by the Master's Group, consisting of Dr. Nectar Torregrosa and myself.[51] The purpose was not to waste time waiting for the budgetary information, but to begin at once consideration of affirmative measures needed to reach compliance by December 31. In my letter to the Secretary, spelling out my ideas, I stressed that "my proposals are just that, proposals" and invited him to inform me of his views. This he did in a document which was prepared under his instructions by Dr. Elena Batista, an institutional planner and member of the Secretary's staff and of the Joint Task Force.[52]

The basic working principle of the Joint Task Force, adopted by consensus, is that its function is to identify the problems and possible solutions to secure compliance, but that it exercises no executive or administrative authority. That authority is exclusively the Secretary's in his dual

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[51] See Appendix "J", dated June 24, 2003. The authority to make the proposal is explicitly spelled out in the terms of reference: "The Master may make informal suggestions to the defendants, in whatever form he deems appropriate, which in his opinion will facilitate compliance with the decree."

[52] See Appendix "K", dated July 15, 2003.

capacity as Secretary of Health and ASSMCA's Administrator. Thus it is the Secretary who has made all key personnel appointments, or has done so through his appointed officials, has created in the Hospital the new directive positions of billing, requisitions and labor relations, and has announced and implemented budgetary decisions. Of first importance is the consensus reached, with the full acceptance of the Secretary, that for compliance to be reached three objectives must be satisfied. First, the question should be answered: what caused the deterioration in the services of the Hospital and the San Patricio Center? As Part A of this report has demonstrated, the primary cause has been insufficient budgetary support. Second, what is required for both institutions to come into compliance? As of this report, this question has yet to be fully answered, but toward that end there has been appreciable progress. Third, what institutional structures should be adopted to substantially reduce the possibility of a repeated deterioration in mental health services in the future? At this stage no more can be reported than that work is in progress toward preparation of a plan for submission to the Court.

All told the Joint Task Force has had ten meetings. The members appointed by the Secretary are professionals of great experience and achievement in their respective fields who have been chosen to contribute their ideas about how most effectively to deal with the problems of the Hospital and its pre and post support system and, in the case of a number of the members, the Secretary has assigned them responsibilities of execution of particular projects. The Secretary has demonstrated his commitment to the work of the Joint Task Force by presiding over most of its meetings and by making prompt decisions to resolve the

problems discussed. These are the members he has appointed: Lcda. Carmen M. Graulau Serrano (appointed by the Secretary to direct ASSMCA under his direction); Lcdo. Rafael Garcia Alvarez, Executive Director of the Hospital; Dr. Reynaldo Rodriguez Llaugier, Medical Director of the Hospital; Lcdo. Julio Cesar Galarce, Principal Assistant to the Secretary; Mr. Jose E. Rodriguez Bon, Director of Financial Affairs, Department of Health; Dr. Elena Batista Valentin, Planning Consultant to the Secretary; Ms. Mirta Fernandez Garcia, Special Assistant to the Secretary for Quality Control of Health Services; and Lcda. Rita Rodriguez Falciani, former Deputy Special Master in the *Navarro Ayala* case and former Legal Advisor to ASSMCA's Administrator.[53] To the efforts of the Secretary's appointed members, there should be added the collaborative participation of the Special Master and his associate, Dr. Nectar Torregrosa.

In this report only the most salient contributions of the Joint Task Members are brought to the Court's attention, salient in terms of contributing to the understanding of the Hospital's problems, as an institution and as a part of a system of mental health services, as well as to their possible solutions.

1. The most important principles adopted by the Joint Task Force and the basis on which the Secretary of Health has formulated mental health policy and specific directives, are the principles of system and continuum of care.

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[53] The professional resumes of the Secretary-appointed members are included in App. "L".

The premise underlying both principles is that the Hospital, taken in isolation, will never be able to fulfill its mission adequately, and certainly will not be able to consistently satisfy the Court's Orders and constitutional standards, unless it can function with adequate resources within a system of pre and post support services which are soundly structured and adequately supported.[54] Within such a mental health system, consisting of interdependent and interacting components, treatment and rehabilitation are provided patients on the basis of implementing the principle of continuum of care. The goal is to maximize the possibility for the patient to lead a normal life in the community. To conceptualize this vision, a power point presentation was prepared with the collaboration of Dr. Nectar Torregrosa, Dr. Reynaldo Rodriguez Llaugier and Lcda. Rita Rodriguez Falciani.[55] Note should be taken that Dr. Rodriguez' vision of precisely how the Hospital should function has been prepared, but has yet to be presented to the Joint Task Force. Note should also be taken of a report prepared by an interdisciplinary group of distinguished

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[54] The point is illustrated by a problem currently being faced by the Hospital. The Hospital is making good progress in repairing the deteriorations detailed in the special master's first report, but still has to resolve a problem which is largely outside its control as an institution: the fact that it has an accumulation of patients who have received the maximum benefits of hospitalization and who still are in need of rehabilitation treatment, but who cannot be placed in a unit of "Hogares" because that rehabilitation service has a long waiting list. The mental health problem is complicated by the fact that it is also a legal problem: the Supreme Court has held that retaining MBH patients violates the liberty guaranty of the Constitution. See *Olmstead v. L. C.*, 527 U.S. 581 (1999).

[55] See "The System of Mental Health Services", incorporated in Appendix "M".

mental health professionals, appointed by ASSMCA's past Administrator, Dr. Dalila Aguilu, "Public Policy in Relation to Mental Health Care", which is presently under consideration for adoption by the Secretary.[56] It cannot be stressed enough that the implementation of the systemic approach to mental health and the principle of continuum of care, as the best way to permanently comply with the Court's Orders, can be traced to policy decisions made by the Secretary.

2. With very few exceptions, the Secretary has also been highly cooperative with the Special Master in two senses: he has arranged for easy access to information needed to implement the investigation expeditiously and he has authorized his staff to undertake projects to facilitate the gathering of needed data.[57] Examples of this noted in Part A of this report are the Income and Expenses study prepared by Ms. Yolanda Muriel, the audit and financial analysis undertaken by Mr. Jose Rodriguez Bon and the study itemizing why the Hospital would require two millions in additional budget to comply fully with the Court's Orders, prepared by an ASSMCA official and the

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[56] "Report of the Task Force on Public Policy in relation to the Mental Health Care System", submitted to ASSMCA's Administrator, June 20, 2003, is incorporated in App. "N".

[57] The only exception of any significance was the failure to make available the Price, Waterhouse and Cooper report which the Commonwealth Government apparently has decided to keep confidential. As noted in Part A, I decided to desist from insisting on reviewing the report because in my opinion it had ceased to have relevance to this case. However, I cannot refrain from expressing my puzzlement over the Government's attitude. The Price, Waterhouse and Cooper report is, after all, a document paid for with public moneys and therefor should be considered a public document open to public scrutiny.

Hospital's Executive Director. Another example is the study prepared by Lcdo. Garcia Alvarez on the requisitions of the Hospital returned by ASSMCA with the message that no funds were available.[58] This factual determination was one of the essential pieces of evidence leading to the conclusion that the Hospital had been operating with budgetary resources well below the support which was needed to comply with the Court's Orders.

Still another important project, approved by the Secretary, was undertaken by Dr. Elena Batista. It involved an all-day workshop of leaders of the distinctive services of the Hospital to develop a consensus with respect to the vision, mission and guiding principles of the Institution, taking into account both an analysis of its internal and external environments.[59] This project is important because the conclusions and recommendations of its personnel will be one of the primary factors in shaping the policies to be implemented in the Hospital. Note should also be taken that Dr. Batista has been assigned the task of preparing a draft on how the Hospital is to be structured in the future, with the security of being able to rely on there being an adequate pre and post support system, and so being able

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[58] For the study demonstrating the return of requisitions with the explanation that there were no funds, see Appendix "O". That there were requisitions returned with the message of no funds, was also confirmed in the study carried out by Mr. Rodriguez Bon. See Appendix "C".

[59] The workshop's program is included in Appendix "P". At the invitation of Dr. Batista, the special master spoke at the opening session to explain the constitutional reasons for the Federal Court's intervention in the affairs of the Hospital.

to avoid lapsing again into a state of non-compliance with the Court's Orders.

To respond to the question of what constitutes compliance with the Court's Orders, Dr. Nectar Torregrosa prepared a comparative study detailing how the Hospital and the San Patricio Center were functioning in 1997 with how each one was functioning in July of 2003, covering staffing patterns, programs of service and other relevant indicia.[60] The premise of the study is that both the Hospital and San Patricio were operating at levels consistent with Court Orders in 1997 and therefor can serve as benchmarks to evaluate whether the reform measures taken up to December 31 of this year are consistent with past levels of acceptability. The value of Dr. Torregrosa's study is that it provides objective criteria for determining compliance. Assuming that adequate budgetary support for the Hospital and San Patricio is forthcoming, it is fair to conclude that there is no reason that the 1997 criteria cannot be met. Note should be taken that Dr. Torregrosa is now at work preparing similar comparative studies of the Trujillo Alto and Cayey Psycho-Socials which offer programs of rehabilitation for mental health patients.

Among the letters I received, and which were shared with the Joint Task, are two which especially merit consideration because they concretely demonstrate why the permanent compliance with the Court's Order in final analysis depends on the Hospital's being able to count on a viable mental health system. The first is a case history sent to me by the highly respected and experienced social worker,

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[60] The comparative study is included in Appendix "I".

Ms. Rita Cordova Campos.[61] The case history presents an account of a mental health patient who is also an addict, who has been in and out of all the components of the mental health system and who at present is awaiting placement in one of the units of the Hogares. How long he must wait is unpredictable, she reports, since there is a waiting list of 200. It is cases such as these who revert quickly to the acute stage of their illness and thus tax the resources of the Hospital.

The second is a letter form [sic] the father of a patient receiving rehabilitation in the Psych-Social located in Cayey.[62] He recounts how difficult it has been for the Psycho-Social to implement its program of rehabilitation due to insufficiency of resources and of how his organization of parents and the Municipality of Cayey have been contributing food and materials of all kinds to keep the Psycho-Social functioning. He was particularly concerned about the failure to retain a psychologist who had been responsible for his daughter's rehabilitation treatment. Again the problem in final analysis is one of a viable mental health system. It defeats one of the principal objectives of the Hospital if those of its patients who are discharged and who are apt candidates for rehabilitation, are unable to be placed in a facility which meets their needs. The result is that sooner, rather than later, such

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[61] Rita Cordova Campos to Special Master, Case History of a Mental Health Patient, July 3, 2003. See Appendix "Q".

[62] The father, Mr. Pedro del Cuadro, heads the Association of Parents Pro Mental Health in Puerto Rico. His letter is dated August 12, 2003 and is reprinted in Appendix "R" and which also includes letters to ASSMCA's Administrator and to Chief Judge Hector M. Laffitte.

cases become part of the revolving door problem and so adversely affect the Hospital's effectiveness. The lesson is clear: it makes no sense to adequately support the Hospital and stint on the resources made available to the other components of the mental health system.

C. Progress Made in the First Three Months of this Fiscal Year

This section of my report will be brief and general because I have still to receive updated detailed written reports of the progress which has been achieved in the functioning of the Hospital. Nonetheless, based on informal conversations with key officials ofthe [sic] Hospital at various levels of authority, I can report that the movement toward compliance has been steady and impressive and that if it continues, the target date of December 31 should be reached by the Hospital itself. The only goal which still remains in serious doubt is whether the problem of the continued large proportion of MBH patients will be resolved institutionally on a regular basis.

To evaluate progress in the case of the Hospital, the starting point is the state of compliance on July 1, 2003. The state of compliance compared with the situation in 1997 is set out in Dr. Torregrosa's comparative study.[63] To this there should be added her study in May of the problems and deficiencies in the emergency wards for men and women.[64] Thus far, the Hospital's Executive Director has submitted two detailed reports of progress achieved and

[63] See Appendix "I".

[64] See Appendix "S".

plans for the months to come, one on July 22[65], and the second on August 25[66], plus a "Work Plan Update"[67] on August 26. From the Medical Director there has been received a utilization report for the month of July and the plan to make the Hospital free of cigarette smoke in September which was successfully executed.[68]

From the written reports and the oral information obtained in the sessions of the Joint Task Force, it is fair to conclude that the Hospital is moving steadily toward compliance with the Court's Orders. Besides measures to put in order the administrative functioning of the Hospital, such as cutting in half the time needed to process requisitions and beginning the process to decentralize its operations, the various professional services are being restored to acceptable levels. For example, the Medical Director informed that on October 15 each of the Hospital's wards would once again have the benefit of an [sic] its own interdisciplinary team, that only one additional psychiatrist was needed to satisfy the minimum number needed, that the number of psychiatrists needed for the emergency wards had been recruited and that plans were in progress to once again reopen PICU, the ward designed to provide rapid and efficacious treatment for acute patients. As a consequence, it has been possible to accept more patients. An additional point which should be made because it illustrates his commitment to restore the Hospital's full potential for mental health services, the

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[65] See Appendix "T".

[66] See Appendix "U".

[67] See Appendix "V".

[68] See Appendix "W".

Secretary has indicated his intention to reopen la Casita which had been closed for lack of budgetary support. In its time la Casita represented an innovation of the first importance in the field of providing rehabilitation services for patients who had remained hospitalized for long periods.

Prior to and again in July visits were made to the San Patricio Mental Health Center and to the Trujillo Alto and Cayey Psycho-Socials. Interviews were carried out with the directors and with the professional and non-professional personnel. With respect to each facility, common deficiencies were found: due to inadequate budget all three facilities were unable to complete the staffing patterns which were needed to effectively implement their programs as those programs had developed as of 1997. All three facilities reported shortages of personnel, supplies and materials of all kinds, resulting in deficient implementation of their programs. The state of affairs as of July, prior to the effective utilization of the 2003-2003 budget, is summarized in the notes taken during the July visit to the San Patricio Center[69], the Trujillo Alto Psycho-Social[70] and the Cayey Psycho-Social.[71] In my next report, there will be an account of whether these three facilities, all essential parts of the Hospital's support system, have been enabled to resolve their manifold problems.

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[69] Appendix "X" is a resume of the notes taken by Dr. Torregrosa in the visit to San Patricio Center on July 3, 2003.

[70] Appendix "Y" is a resume of the notes taken by Dr. Torregros [sic] in the visit to the Trujillo Alto Psycho-Social on July 16, 2003.

[71] Appendix "Z" is a resume of the notes taken by Dr. Torregrosa in the visit to the Cayey Psycho-Social on July 17, 2003.

D. Conclusions and Recommendations

The conceptual framework: the Rio Piedras Psychiatric Hospital is one component of the mental health system serving the northeastern region of Puerto Rico; the Hospital's compliance with the Court's Orders on a continuing basis, presently and on into the future, depends on the overall viability of the system of which it is an integral component; the mental health system's mission is to assure patients the implementation of the principle of continuum of care; to achieve that objective, each component of the system has to be budgeted adequately and the system must include effective communication and collaboration between the interdependent components.

1. From the information I have received thus far, only the Hospital has a plan to come into compliance. It is effectively being implemented – with two caveats. First, its approved budget will be short by two millions based on the Hospital's projected expenses and income for fiscal 2003-2004. The problem has been, and continues to be, not one of access to its budget, but rather one of an insufficient budget. Second, compliance will only become feasible if the problem is solved of providing places in the Hogares network for patients who need that type of rehabilitation service and who have received the maximum benefits of hospitalization. With respect to both caveats, the Secretary of Health should be requested to respond with his proposed solutions.

2. The San Patricio Mental Health Center has an approved budget of $5.5 millions, but no study has been made to determine whether that amount is sufficient to restore the eight programs of services which were in place

in 1997. What is needed is the preparation of a programmatic budget and a plan for its overall implementation in collaboration with the Hospital and the other components of the mental health system.

3. In the visits of the Special Master and his associate, Dr. Nectar Torregrosa, they found that the Psycho-Socials of Cayey and Trujillo Alto were operating under conditions well below acceptable norms and their potential for providing services, due to insufficient budgets, as compared to how they were functioning in 1997. What is called for, as in the case of the San Patricio Center, is a programmatic budget to restore their programs to their former efficacious performance.

4. From the information I have received, the most serious systemic problem is the condition of the program of Hogares which presently is reported to have a waiting list of over two hundred. Even more troubling are comments to the effect that the existing program is not implementing its rehabilitation mission. What is required is a diagnostic study, followed by a remedial plan, backed by the necessary budgetary resources.

5. Conclusions and recommendations two, three and four, above, call for action by the Secretary of Health and, as well, in his capacity as head of ASSMCA.

Respectfully submitted,

/s/ David M. Helfeld
David M. Helfeld
Special Master
October 15, 2003

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	
v.	*	**Civil No. 74-1301 (HL)**
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* *

MOTION IN RESPONSE TO COURT ORDER

(Filed May 6, 2003)

TO THE HONORABLE COURT:

COME NOW the Commonwealth defendants, through their counsel of record, and respectfully state and pray:

1. By Order of April 29, 2003, this Honorable Court issued an Order expressing concern with the defendants' compliance with the Order of January 28, 2003; reappointing Dr. David Helfeld as Special Master and notifying the parties of forthcoming investigations.

2. In its Order the Court notes that the Commonwealth, as promised by Dr. John Rullán at the April 12, 2003 status conference, voluntarily notified the Court that it was considering an agreement between Behavioral Health Care Partners (BHP) and ASSMCA, which among other dispositions, would assign to BHP a maximum of thirty beds in the Rio Piedras Psychiatric Hospital and the payment of sixty cents for each insured person in the region contracted. The Court's Order states that "the

Court has received information which, if true, is to the effect that the agreement has been signed and is presently operative." In addition, the Court states "other alleged problems of non-compliance have been brought to its attention." Finally, the Court notes that "a document has been received, prepared by mental health professionals, employees of the Center, which alleges a series of deficiencies in services to patients, as a consequence of the implementation of BHP's policies and procedures." The Court concludes "the alleged deficiencies are incompatible with compliance." As a consequence of the foregoing "evidence" the Court mandates that "an investigation be carried out" and "reappoints Dr. David Helfeld as Special Master to effectuate the investigation and to report to the Court his findings and recommendations with all deliberate speed."

3. On the basis of said mandate Dr. Helfeld has proceed [sic] to hold ex-parte meetings with Commonwealth officials and Department of Justice consultants, such as Dr. Dalila Aguilú (Administrator of ASSMCA), Dr. Reynaldo Rodriguez Llauger (Medical Director for the Psychiatric Hospital), Dr. Orlando Torres (San Patricio Mental Health Center Director) and Linda Navedo (Consultant for the Department of Justice). Dr. Helfeld has also set future interviews with Dr. Rullán, the Secretary of Health, the undersigned attorney for the Commonwealth defendants, and has convened the Faculty and the Program Directors of the Hospital for ex-parte factfinding sessions.

4. The Commonwealth objects to this ex-parte investigation by the Special Master. By Order of January 28, 2003, the Court ordered the dismissal of the case at bar. The evidence on which the Court has moved for the reappointment of Dr. Helfeld and an "investigation" of the

case is based on allegations that have been submitted ex-parte to the Judge, without notice to the parties, without opportunity to be controverted by the Commonwealth defendants, and without any regards for the constitutional principle of due process of law. The evidence is not only unattenuated hearsay, but insofar as the Court discloses its content – that the agreement with BHP has been signed and present operative – is patently false. The Court has authorized an ex-parte investigation by the Special Master that does not adhere to basic principle of due process of law, such as notifying counsel of the proposed objects of interview and allowing the presence for counsel for either plaintiffs or defendants.

5. This departure from basic principles of law – such as the opportunity to examine the evidence that moves the Court to the reappoitment [sic] of the Master, the opportunity to present contrary evidence, the opportunity to know beforehand of the Special Master's proposed interview agenda, the opportunity to have counsel present – is unbecoming of judicial fact-finding under our constitutional system.

6. The Commonwealth is willing to respond to any legitimate inquires [sic] the Court may have with respect to the defendants compliance with the terms of the dismissal order. It attended the April 12, 2003 session with the Court on a voluntary basis and with the best good faith. There it averred that neither the budget of the Hospital nor the San Patricio Mental Health Center would be affected. In good faith it also submitted the contemplated BHP agreement but expressly stated it would not be signed without Court approval. And despite the rumors that has moved the Court to act – said agreement has not been signed and will not be signed absent Court consent.

Under these facts, and given the good faith dealings of the defendants with the Court, the wholesale ex-parte investigation authorized by the Court and being engaged in by the Special Master is not warranted either in fact, in law or in equity.

WHEREFORE the Commonwealth defendants respectfully pray from this Honorable Court that it take note of the foregoing, and allow the Commonwealth defendants to meet with the Court in a status conference to formally address the issues that may be germane its concerns.

In San Juan, Puerto Rico, this May 5, 2003.

RESPECTFULLY SUBMITTED.

It is hereby certified that on this date, a true copy of this motion was notified to Carlos V. Garcia Gutierrez, Esquire, Suite 720, Mercantil Plaza Building, 2 Ponce de Leon Avenue, San Juan, Puerto Rico 00918-1611; Dr. David Heldfeld [sic], by hand.

ANABELLE RODRIGUEZ
Attorney General
Department of Justice
Commonwealth of Puerto Rico

/s/ Carlos Del Valle Cruz
CARLOS DEL VALLE CRUZ
USDC-PR Bar No. 130604
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Fax No. (787) 722-4440

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	
v.	*	**Civil No. 74-1301 (HL)**
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* *

MOTION SUBMITTING AFFIDAVITS AND NOTIFYING APPEAL

TO THE HONORABLE COURT:

COME NOW the Commonwealth defendants, through their counsel of record, and respectfully state and pray:

1. On May 5, 2003, the Commonwealth defendants filed a Motion in Response to Court Order of April 29, 2003 where the defendants objected on constitutional due process grounds to the ex-parte investigation being carried on by the Special Master with respect to a case that is judicially closed and requesting a status conference to discuss the issues raised. The Court has not ruled on said motion.

2. In support of said motion, we hereby submit the Statements of: (Ex. A) Dr. Dalila Aguilú Lavalett, Administrator of the Mental Health and Anti-Addiction Services Administration; (Ex. B) Carlos B. Cabrera Bonet, the Deputy Administrator of the Auxiliary Administration of Adult Treatment of the Mental Health and Anti-Addiction Administration; (Ex. C) Ms. Jane Vega Lamando, the

Executive Director of the Rio Piedras Psychiatric Hospital; (Ex. D) Dr. Reinaldo Rodríguez Llauger, the Medical Director of the Rio Piedras Psychiatric Hospital; and (Ex. E) Orlando Torres Pérez, the Clinical Director of the San Patricio Mental Health Center. All these persons have been questioned by the Special Master and required to produce documentation without notice to counsel for the parties, without the opportunity for counsel to be present, and without notice of the request for production of documents; in sum, the Special Master has engaged in fact-finding outside the margins of legal safeguards.

3. At a meeting held on May 6, 2003, the undersigned counsel raised these objections with the Special Master and the same indicated that he did not coincide with the legal arguments raised by the defendants and that he would proceed with his ex-part [sic] investigation.

4. For the reasons developed in our prior motions, the Court is respectfully informed that the defendants are proceeding to file an appeal before the Court of Appeals for the First Circuit and that therefore all proceedings should be stayed pending the outcome of the appeal.

WHEREFORE the Commonwealth defendants respectfully pray from this Honorable Court that it stay the investigation of the Special Master.

In San Juan, Puerto Rico, this May 21, 2003.

RESPECTFULLY SUBMITTED.

It is hereby certified that on this date, a true copy of this motion was notified to Carlos V. Garcia Gutierrez, Esquire, Suite 720, Mercantil Plaza Building, 2 Ponce de

Leon Avenue, San Juan, Puerto Rico 00918-1611; Dr. David Heldfeld [sic], by hand.

ANABELLE RODRIGUEZ
Attorney General
Department of Justice
Commonwealth of Puerto Rico

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EXHIBIT A

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301 (HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

STATEMENT OF DALILA E. AGUILU LAVALETT

1. I, Dalila E. Aguilú Lavalett, am the Administrator of the Mental Health and Anti-Addiction Services Administration since April 2001.

2. I was contacted on or about April 29, 2003 to meet with Dr. David Helfeld at the federal courthouse on April 30, 2003. At said meeting I was accompanied by the consultant from the Department of Justice, Linda Navedo, and Rita Rodriguez Falciani, and advisor, but Dr. Helfeld requested that Navedo not be present at the meeting. During the meeting, Dr. Helfeld explained that he was investigating the facts and would interview various government personnel, but that he was not opening the case. Dr. Helfeld said he received information that the Administration had a contract with BHP and he wanted to know whether said contract had been signed. I explained to Dr. Helfeld that there was no contract signed with BHP, but that a proposed contract had been submitted for court review pursuant to the Court's request. Dr. Helfeld stated that the information he had received via several means indicated that the contracts with BHP had adversely affected the operation of the Psychiatric Hospital and San Patricio Mental Health Center. Dr. Helfeld asked me to describe the whole process of negotiations with BHP and to produce for him all documentation related to the negotiation process. The production of documents requested by Dr. Helfeld is reproduced at Exhibit A, a voluminous production submitted subsequently on May 14, 2003.

3. In addition, Dr. Helfeld asked me to prepare a written position paper with concerning my personal view on what the mental health public policy should be, a

report that to this date I have not had the time to prepare for Dr. Helfeld.

4. On or about May 12, 2003, Dr. Helfeld called me to ask me about the pending document production and the role of the accounting firm of Price Waterhouse in the restructuring of the Administration. Dr. Helfeld asked me to produce a report prepared by the Commonwealth Office of Management and Budget (OMB) with respect to the agency I head. In addition, Dr. Helfeld asked me to formalize the designation of Rita Rodriguez Falciani, a legal advisor in my staff, as liaison between himself and the agency as previously agreed to in our initial meeting. At his request, I named her the liaison by letter of May 13, 2003. See Exhibit B.

5. On May 19, 2003, I received another citation to appear before Dr. Helfeld on May 22, 2003; and another request for production of documents. See Exhibit C.

6. Upon receipt of this citation of May 19, 2003, I notified attorney Carlos A. Del Valle Cruz, of the Commonwealth Department of Justice, my counsel of record in this case, who has asked me to prepare this statement.

7. As Administrator of the Mental Health and Anti-Addiction Services Administration, I am a defendant in this case, and I have no knowledge if the attorneys of record in the case have been notified of the interviews, production of documents and other processes in this case conducted by Dr. Helfeld.

I declare that under penalty of perjury that the foregoing is true and correct.

In San Juan, Puerto Rico, this May 21, 2003.

/s/ Dalila E. Aguilú Lavalett
Dalila E. Aguilú Lavalett

EXHIBIT B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301 (HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * *

STATEMENT OF CARLOS A. CABRERA BONET

1. I, Carlos A. Cabrera Bonet, am the Deputy Administrator of the Auxiliary Administration of Adult Treatment of the Mental Health and Anti-Addiction Administration, a position I have occupied since on or about June 2001. The Rio Piedras Psychiatric Hospital is one of the service [sic] and facilities that fall under the Adult Treatment Administration and I supervise its Executive Director, Jane Vega.

2. On May 20, 2003 at about 9:00 am I received a telephone call from a man who identified himself as Dr. David Helfeld, who requested a meeting with me the next day, at the Río Piedras Psychiatric Hospital. The next day

we met at the office of the Executive Director of the Hospital, Ms. Jane Vega, and when he saw her Dr. Helfeld asked her what she was doing there and Vega replied that she was the Executive Director of the Hospital "or is there anything I should know." It was rather an uncomfortable moment because apparently Dr. Helfeld made in indiscrete comment with respect to information in his power.

3. During the interrogation, Dr. Helfeld informed me that he had met with the Medical Faculty and the Hospital Director and that they had told him there was a malaise due to the shortages at the Hospital and that he needed to investigate the reasons for said conditions. Dr. Helfeld then asked me to prepare for him a report for Monday May 26, 2003 of each and every transaction denial for lack of funds with respect to material, medicine, personnel and equipment for the last six months, with copies of the same. I indicate that most of the shortages where [sic] not due to lack of funds but to bureaucratic delays, since the Hospital was a "bubble" insofar as its budget was protected. Dr. Helfeld insisted that the lack of funds was the main reason for the shortages. He also inquired about the San Patricio Center and the lack of funds, and I informed him that matter had been taken care at a meeting before Judge Laffitte. Dr. Helfeld questioned the veracity of said statement. At said time, Dr. Helfeld told me he was going to meet with Dr. Reynaldo Rodríguez Llauger and I took him to his office, informing Dr. Helfeld that I would try to prepare the Report he requested.

4. Dr. Helfeld met with me without notice to attorney either for plaintiffs or defendants and without informing me whether I had a right to have counsel present.

I declare that under penalty of perjury that the foregoing is true and correct.

In San Juan, Puerto Rico, this May 21, 2003.

/s/ Carlos A. Cabrera Bonet
Carlos A. Cabrera Bonet

EXHIBIT C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301 (HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

STATEMENT OF JANE E. VEGA LAMANDO

1. I, Jane E. Vega Lamando, am the Executive Director of the Rio Piedras Psychiatric Hospital, a position I have occupied since June 2001.

2. In early May I received a telephone call from a man who identified himself as Dr. David Helfeld, who informed me that on May 6, 2003 he would be inspecting the Río Piedras Psychiatric Hospital, that he would spend the whole day there, and that I should arrange meeting with attorney Carlos Del Valle at 9:30 AM; at 10 AM with

the Medical Faculty; and 12 noon with all Department Directors and Supervisors; and at the end with me.

3. I asked Dr. David Helfeld to participate in the meetings of the Medical Faculty and the Department Directors and Supervisors, as was my custom as Executive Director, but he said I was not allowed to be present. Neither was attorney Carlos Del Valle from the Department of Justice.

4. I met with Dr. Helfeld and with a person identified as his assistant, Dr. Torregrosa, from 3:30 to 5:30 PM. Dr. Helfeld made inquiries with respect to whether the central level was conscious of the fiscal allocation mandated by the court order, to which I replied affirmatively. he asked whether that budget was sufficient and I replied that I could not answer that question because the budget was controlled by the central office, not the Hospital, but to the best of my knowledge all the budget required by the court was allocated for the Hospital.

5. Then Dr. Helfeld asked whether there were pending transactions with respect to personnel and material from central office, and I replied affirmatively. I also indicated to his question that all personnel transactions, including medical doctors, were at the central level. I told Dr. Helfeld that there were no medical personnel transactions pending, that the funds were available but there was no candidates interested. I explained to him that the all transactions were commenced at the Hospital but were executed at the central level, I indicated that the Department of Justice was doing an audit of the finances via the person of Linda Navedo, and the Dr. Helfeld questioned her expertise in the manner. Dr. Helfeld also inquired with respect to the negotiations with a health provider

called BHP, and I explained to him the concept of capitation, and that the contract had not been signed. To his questioning, I explained to Dr. Helfeld that I was a full-time administrator at the Hospital and had no other work engagements.

6. After that meeting, Dr. Helfeld called me on May 13 to inform that that he would be sending his assistant Dr. Torregrosa to inspect various wards of the Hospital. On May 15, 2003 Dr. Torregrosa came and told me she would engage in a clinical review of the Hospital's operation. Dr. Reynaldo Rodriguez Llauger, the Medical Director, coordinated her inspections but was not allowed to be present during them. Dr. Torregrosa asked me to produce the census reports for various months, which I produced for her during the day, and the statistical sheet for the Hospital from 2001 to date.

6. The last time I saw Dr. Helfeld was today, when he went to my office and he asked what I was doing at the Hospital, and I told him that I was its Executive Director, and he asked me whether I had been transferred and I replied not to my knowledge. I asked him who had told him that I was going to be transferred, and he said he would not give names, but it was a person of high rank and power. Later during the day, Dr. Helfeld came to me to congratulate me on my promotion and pay raise, and I told him that I had not asked for a promotion nor a raise, and that as far as I was concerned my transfer was by instructions of the court.

7. As Executive Director, I am a defendant in this case, and at no time has Dr. Helfeld notified my attorneys of his intentions to interrogate me, nor have my attorneys been notified of the request for production of documents,

nor have my attorneys have been allowed to be present in any meeting of Dr. Helfeld or Dr. Torregrosa with my person.

I declare that under penalty of perjury that the foregoing is true and correct.

In San Juan, Puerto Rico, this May 21, 2003.

/s/ Jane E. Vega Lamando
Jane E. Vega Lamando

EXHIBIT D

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301 (HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

STATEMENT OF REYNALDO RODRIGUEZ LLAUGER

1. I, Reynaldo Rodriguez Llauger, am the Medical Director of the Rio Piedras Psychiatric Hospital of the Mental Health and Anti-Addiction Services Administration since February 2002.

2. I was cited to meet with Dr. David Helfeld at the federal courthouse on April 30, 2003. In said meeting, we discussed the areas of needs being faced by the Hospital such as the Psychiatric Emergency Room, the Center of Extended Observation, the Psychiatric Intensive Care Unit, the Faculty, Nursing, Social Workers. Therapists, and Pharmacy among other issues. At the end of the meeting Dr. Helfeld verbally asked me to prepare a report of the issues that had been discussed, and on May 21, 2003, I submitted the same to him.

3. In addition, I briefly met with Dr. Helfeld on May 6, 2003, when he visited the Hospital and met with the Medical Faculty, but apart from introducing him to the faculty, I did not participate in said meeting.

4. I also met briefly with Dr. Helfeld today, May 21, 2003, when he went to the Hospital to pick up the Situation Report I had prepared for him. In addition, he requested from me the preparation of a report concerning my views of APS and FHC policies within the operational scope of the Hospital.

5. On or about May 14, 2003, Dr. Helfeld's assistant, Dr. Nectar de la Rosa Torregrosa, met with me to inquire and inspect the functioning of the Psychiatric Emergency Room and related areas. In said meeting, I also provided to Dr. Torregrosa general statistical data concerning the Hospital's clinical operations.

6. I'm not aware whether the attorneys of record have been formally notified by Dr. Helfeld of his citations of my person or of his request for the preparation of a Situation Report. I have not been accompanied by counsel in any of the meetings with Dr. Helfeld or his assistant, Dr. Nectar Torregrosa. The Situation Report was prepared

and delivered by my person, at Dr. Helfeld's request, without consultation with counsel.

I declare that under penalty of perjury that the foregoing is true and correct.

In San Juan, Puerto Rico, this May 21, 2003.

/s/ Reynaldo Rodríguez Llauger
Reynaldo Rodríguez Llauger

EXHIBIT E

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301 (HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

STATEMENT OF ORLANDO TORRES PEREZ

1. I, Orlando Torres Pérez, am the Clinical Director of the San Patricio Mental Health Center of the Auxiliary Administration of Adult Treatment of the Mental Health and Anti-Addiction Services Administration since July 2001.

2. I was contacted on or about April 29, 2003 by the secretary of Judge Laffitte to appear at the federal courthouse on April 30, 200 at 5:30 PM. Upon arriving at the Judge's office I was informed that I would be questioned by Dr. David Helfeld. At 6:30 PM, I was called By Dr. Helfeld and he explained that he had been designated a Special Master by the court and that he would question me with respect to allegations made by several letters sent to the Judge by employees and community representatives. He asked me whether I agreed with the statement in the letters, and I replied that I did not know the contents of the letters. Dr. Helfeld then asked me it there was a possible closing of the San Patricio Center, and I replied that I believed it was a possibility. We discussed various issues concerning the operations of the Mental Health Center, such as the relationship with BHP and APS. He asked me to inform the Center employees that at any moment he could go visit the facilities and interview any employees. He indicated that he would inspect the Center and on May 10, 2003 he went to the facilities where he met Supervisory and Program Coordination Teams. I indicated that the Center had advocacy groups against the closing of the same and that they would want to meet with him, and he also met with them on his visit.

3. In addition, Dr. Helfeld ordered me to produce an assortment of documents, which are enumerated in Exhibit A. Dr. Helfeld, furthermore, gave me as an assignment to prepare a Report justifying why the Center should continue to provide for the mental health services and the private health insurance providers. See Exhibit B. I prepare the same for Dr. Helfeld, who personally came to pick all documents with Dr. Nectar Torregrosa up on May 16, 2003.

4. To my knowledge, the attorneys of record in the case have not been notified of the interviews and production of documents required of me by Dr. Helfeld.

I declare that under penalty of perjury that the foregoing is true and correct.

In San Juan, Puerto Rico, this May 21, 2003.

/s/ Orlando Torres Pérez
Orlando Torres Pérez

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301 (HL)**
v.	*	
SILA M. CALDERON et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

NOTICE OF APPEAL

TO THE HONORABLE COURT:

Come Now the Commonwealth defendants in this case, the Hon. Sila M. Calderón, Governor of the Commonwealth of Puerto Rico, Dr. John Rullán, Secretary of Health, Dr. Dalila Aguilú Lavalett, Administrator of the Mental Health and Anti-Addition Services Administration, Dr. Reinaldo Rodríguez Llauger, the Medical Director of the Rio Piedras Psychiatric Hospital, Ms. Jane Vega, the Executive Director of the Rio Piedras Psychiatric Hospital, and their agents and employees, individually and in their official capacity, and appeal from the Order of April 29, 2003 designating a Special Master to investigate ex-parte and report on the Rio Piedras Psychiatric Hospital, and from the Orders of May 19, 2003 of Dr. David Helfeld.

In San Juan, Puerto Rico, this May 21, 2003.

RESPECTFULLY SUBMITTED.

It is hereby certified that on this date, a true copy of this motion was notified to Carlos V. García Gutierrez,

Esquire, Suite 720, Mercantil Plaza Building, 2 Ponce de Leon Avenue, San Juan, Puerto Rico 00918-1611

ANABELLE RODRIGUEZ
Secretary of Justice

IVONNE PALERM
Assistant Secretary for Litigation

/s/ Carlos A. del Valle Cruz
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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301 (HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

INFORMATIVE MOTION

(Filed June 16, 2003)

TO THE HONORABLE COURT:

COME NOW the Commonwealth defendants, through their counsel of record, and respectfully state and pray:

1. This Honorable Court has scheduled a status conference for June 17, 2003 at 4:00 P.M, pursuant to the request for the same prayed for in the Commonwealth's Motion of May 5, 2003.

2. Following said Motion, however, the Commonwealth filed an appeal from the Court Order of April 29, 2003, designating Dr. David Helfeld as a Special Master to engage in an investigation and report of the Psychiatric Hospital. With the filing of said appeal, the district court loses jurisdiction over the case. As the First Circuit noted in *United States v. Brooks*, 145 F.3d 446, 456 (1st Cir. 1998) (internal citations omitted; emphasis added):

> We begin with accepted doctrine: as a general rule, the filing of a notice of appeal divests the district court of authority to proceed with respect to any matter touching upon, or involved in, the appeal. . . . Though judicially spawned, not legislatively ordained, this rule has sturdy roots. . . . It derives from the notion that shared jurisdiction almost always portends a potential for conflict and confusion, . . . and although there has been some movement in the direction of a more flexible approach, . . . the principle that jurisdiction over a single case ordinarily should reside in a single court at any single point in time still has widespread applicability . . . Allowing more than one court to take charge of a case at any given moment often disserves the interests of comity and judicial economy.

3. This Court closed the case at bar on January 28, 2002. Plaintiffs have not sought the reopening of the same. The April 29, 2003 Order naming a Special Master to conduct and ex-parte investigation against the Commonwealth defendants is an order in a case over which the Court does not enjoy jurisdiction and in effect constitute new interlocutory injunctive relief over which the Court of appeals has jurisdiction pursuant to either 28 U.S.C. § 1291-1292.[1]

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[1] There is little merit to the charge in the Special Master's Report that the undersigned "obstructed" the investigation by the "May 21 [2002] motion and the instructions to officials and employees not to meet or give information to the Special master except with permission of counsel." (10). On May 5, 2003, the Commonwealth challenged the jurisdiction and conduct of the Special Master and the Court never ruled on the motion. As a result, on May 21, 2003, the Commonwealth filed its appeal of the Order naming the Special

(Continued on following page)

4. The Commonwealth defendants, however, will appear before the Court on June 17, 2003. This appearance is out of deference to the Court and does not constitute a waiver of the Commonwealth's appeal before the Court of Appeals nor to the jurisdictional and constitutional arguments to be presented by the Commonwealth defendants.

5. In said Status Conference, the Commonwealth's Secretary of Health, Hon. John Rullán, will report to the Court with respect to the measures taken to strengthen Hospital services and convert the Hospital into a first-class psychiatric center, equivalent to the Pediatric Hospital or the Cardiovascular Center. The Secretary attaches herein Administrative Order No. 181 of June 13, 2003, naming a Special Committee for the purpose of strengthening the management of the Hospital and for establishing those administrative and fiscal structures needed to make the services more efficient and agile.

Master. All Commonwealth officials met and provided information to the Special Master prior to the filing of the notice of appeal. Said conduct ceased *only after was the appealed was filed*, because an appeal divests a district court of jurisdiction, hence the Special Master ceased to have the authority to investigate. The filing of his Report to the Court was without jurisdiction. The charge of obstruction is an uncalled for attempt to penalize, intimidate and publicly damage a 25-year practice and reputation before this Court for no other reason than good advocacy in the exercise of appellate and constitutional rights of Commonwealth defendants. The First Circuit has previously reversed the Special Master for the abusive use of his powers against Commonwealth attorneys. See *Navarro Ayala v. Hernández Colón*, 3 F.3d 464 (1st Cir. 1993) (Reversing for Special Master's abusive use of sanctions against PRDOJ attorney Kenneth Colón).

6. The Special Committee is headed by the Secretary of Health himself, and is composed of Myrta Fernández as its executive coordinator, former psychiatric Hospital Director Judith Mark Tuyol and Ricardo Torres Muñoz, the Assistant Secretary for the Regulation and Accreditation of Health Facilities (SARAFS). Ms. Fernández is a Special Aide in charge of Quality Assurance, experienced in the accreditation of medical and mental health facilities. In addition, José Rodríguez Bon, the Department of Health's Fiscal Manager, is part of the Committee. The Special Committee met on June 16, 2003 with AASCMA personnel: Francisco Alvárez, Deputy Administrator of AAMSCA; Yolanda Muriel Falx – Assistant Secretary for Administration; Carlos Cabrera – Acting Medical Director of the Psychiatric Hospital; Reynaldo Rodríguez Llauger, the Hospital's medical Director; and Elena Batista, a consultant in strategic planning.

7. The Special Committee divided into seven (7) Working Groups, in charge with working in the following areas:

(A) Strategic Planning: this Working Group, headed by Elena Batista, will meet with all the directive component of the Hospital – from administration to labor unions – to develop its values, mission and long-range planning.

(B) Administrative Reorganization – the Hospital will acquire fiscal and administrative autonomy in order to improve and expedite billing, recruitment, purchasing. Judith Mark Truyol, former Director of the Psychiatric Hospital from 1987-94, will head this Working Group.

(C) Financial Matters – to engage in audit of budget, to strengthen invoicing and payment by the establishment in the Hospital of administrative area in order to increase budget from medical plan and other external resources. DOH Fiscal Manager José Rodríguez Bon and ASSMCA's Yolanda Muriel will head this Working Group.

(D) Purchasing – this Working Group is engage in expediting the purchasing of equipment and medicine so that medicaments can be purchased by the Hospital directly and are readily available as needed.

(E) Human Resources – this Group is in charge of promoting the increase of Hospital psychiatrists by increasing their compensation and establishing a Residency Program in the Hospital, that will serve as a teaching and training center.

(F) Physical Plant – this Group seeks to upgrade physical plant by making the Hospital air conditioned, improving the power sources and increasing the water pressure.

(G) Employee Wellness – this Group will engage in a complete evaluation of all Hospital employees to improve their physical and mental fitness and institutional solidarity.

8. The Special Committee will render its first Progress Report in thirty (30) days.

WHEREFORE the Commonwealth defendants respectfully pray from this Honorable Court that it take note of the foregoing.

In San Juan, Puerto Rico, this June 16, 2003.

RESPECTFULLY SUBMITTED.

It is hereby certified that on this date, a true copy of this motion was notified to Carlos V. García Gutierrez, Esquire, Suite 720, Mercantil Plaza Building, 2 Ponce de Leon Avenue, San Juan, Puerto Rico 00918-1611; Dr. David Helfeld, by hand.

ANABELLE RODRIGUEZ
Attorney General

IVONNE PALERM CRUZ
Assistant Secretary for Litigation

/s/ Carlos Del Valle Cruz
CARLOS DEL VALLE CRUZ
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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301 (HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * *

AMENDED NOTICE OF APPEAL TO THE FIRST CIRCUIT

(Filed Jun. 19, 2003)

TO THE HONORABLE COURT:

COME NOW the Commonwealth defendants, through their counsel of record, and respectfully state and pray:

1. On May 21, 2003, the Commonwealth defendants filed a Notice of Appeal in the instant case and On [sic] May 27, 2003, they deposited the appellate fees. On this date, the Commonwealth defendants filed this amended notice of appeal amending the Notice of Appeal of May 21, 2003 to include an appeal of the Order of June 18, 2003 of the District Court.

WHEREFORE the Commonwealth defendants respectfully pray from this Honorable Court that it take note of the foregoing.

In San Juan, Puerto Rico, this June 19, 2003.

RESPECTFULLY SUBMITTED.

It is hereby certified that on this date, a true copy of this motion was notified to Carlos V. García Gutierrez, Esquire, Suite 720, Mercantil Plaza Building, 2 Ponce de Leon Avenue, San Juan, Puerto Rico 00918-1611.

ANABELLE RODRIGUEZ
Attorney General

/s/ _____
CARLOS DEL VALLE CRUZ
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Fax No. (787) 722-4440

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	
v.	*	**Civil No. 74-1301 (HL)**
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* *

MOTION REQUESTING THAT FISCAL STATEMENT BE INCLUDED IN THE RECORD AND REQUESTING TRANSCRIPT OF STATUS CONFERENCES

(Filed June 23, 2003)

TO THE HONORABLE COURT:

COME NOW the Commonwealth defendants, through their counsel of record, and respectfully state and pray:

1. On March 18, 2003 and June 17, 2003 this Honorable Court held status conferences with the Commonwealth defendants in this case. In its Order of June 18, 2003, the Court states that "defendants failed to make any specific objections to the findings and recommendations in Dr. Helfeld's unfinished report." Our recollection of the events is that ASSMCA strongly objected to the suggestions or findings in said report that allotted funds to the Hospital had been diverted and that the Hospital was not funded in the amount of $18,924,000.00 for either FY 2002-2003 or 2003-2004. To said effect testified Secretary of Health John Rullán, ASSMCA Administrator Dalila

Aguilú Lavelette, ASSMCA Deputy Administrator Francisco Alvarez, and ASSMCA Assistant Secretary for Administration Yolanda Muriel. In particular, the Commonwealth defendants produced a Fiscal Report of income and spending for FY 2002-2003 that showed that the finding of Dr. Helfeld that the $18.9 million budget was not Hospital-used is inconsistent with the AASMCA [sic] Report and that all Commonwealth defendants asserted to the Court that there was no basis for the finding in Dr. Helfeld's report that the Psychiatric Hospital's budget for FY 2003-2004 does not complies with the requirement of the stipulation. To our best recollection, it was not that the Commonwealth defendants did not make any specific objections to the findings and recommendations of Dr. Helfeld's unfinished report, but that the Court did not validate the testimony and evidence as truthful or reliable.

In addition, on this date, we have just received copies of the Minute of Proceedings of June 19, 2003, where the Court states that the parties have agreed to ex-parte meetings of the Court and the Special Master. To my best recollection, the Judge indicated that he wished to meet ex-parte with the Secretary of Health, and counsel acquiesced to said judicial request, but did not consent to general ex-parte proceedings by the Court; and in particular, not to ex-parte proceedings by the Special Master. Insofar as the Court interpreted that the Department of Justice consented to generalized ex-parte proceedings by the Court or the Special Master, we hereby clarify that our position was limited to the meeting expreessly requested by the Judge with Secretary Rullán. The Judge did go on to suggest that said consent also was consent for ex-parte proceedings by the Special Master, but counsel for the Commonwealth defendants did not acquiesce to said

suggestion, as said conduct is precisely the object of our appeal.

In order to have a full and faithful record, the Commonwealth defendants herein pray that the transcript of both status conference be reproduced and be made part of the record on appeal and that the evidence submitted to the Court, namely the ASSMCA Fiscal Report, also be made part of the record on appeal. In addition, it is respectfully requested that the record be corrected to show that counsel only agreed to the request of the Judge to meet ex-parte with the Secretary of Health, and not to generalized ex-parte proceedings by the Court and in particular not to ex-parte proceedings by the Special Master. The lawfulness of said ex-parte proceedings and conduct is precisely the controversy the Commonwealth is submitting to the Court of Appeals for review.

WHEREFORE, in order to have a full and faithful record the Commonwealth defendants respectfully pray from this Honorable Court that the transcript of status conference of March 18 and June 17, 2003 be reproduced in their totality and be made part of the record on appeal and that the evidence submitted to the Court, namely the ASSMCA Fiscal Report, also be made part of the record on appeal; and that the record be clarified to show that counsel for defendants did not consent (apart from meeting of the Judge with Secretary Rullán) to generalized ex-parte proceedings by the Court and/or the Special Master.

In San Juan, Puerto Rico, this June 23, 2003.

RESPECTFULLY SUBMITTED.

It is hereby certified that on this date, a true copy of this motion was faxed to Carlos V. Garcia Gutierrez,

Esquire, Suite 720, Mercantil Plaza Building, 2 Ponce de Leon Avenue, San Juan, Puerto Rico 00918-161.

ANABELLE RODRIGUEZ
Secretary of Justice

Ivonne Palerm Cruz
Assistant Secretary for Litigation

/s/ Carlos Del Valle Cruz
CARLOS DEL VALLE CRUZ
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	
v.	*	**Civil No. 74-1301 (HL)**
SILA M. CALDERON, et al.	*	
Defendants.	*	

* *

SECOND AMENDED NOTICE OF APPEAL TO THE FIRST CIRCUIT

(Filed June 23, 2003)

TO THE HONORABLE COURT:

COME NOW the Commonwealth defendants, through their undersigned attorneys, and very respectfully state and pray:

Notice is hereby given of a Second Amended Notice of Appeal to reflect inclusion of the Minute of Proceedings of June 19, 2003 insofar as they authorized generalized ex-parte proceedings by the Court and/or the Special Master.

WHEREFORE, it is respectfully prayed that the Court take note of the foregoing.

RESPECTFULLY SUBMITTED.

In San Juan, Puerto Rico, this June 23, 2003.

RESPECTFULLY SUBMITTED.

It is hereby certified that on this date, a true copy of this motion was faxed to Carlos V. Garcia Gutierrez, Esquire, Suite 720, Mercantil Plaza Building, 2 Ponce de Leon Avenue, San Juan, Puerto Rico 00918-161.

ANABELLE RODRIGUEZ
Secretary of Justice

Ivonne Palerm Cruz
Assistant Secretary for Litigation

Carlos Del Valle Cruz
CARLOS DEL VALLE CRUZ
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	
v.	*	**Civil No. 74-1301 (HL)**
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

* *

REPLY TO RESPONSES OF THE PLAINTIFFS AND THE MASTER

(Filed Jul. 14, 2003)

TO THE HONORABLE COURT:

Comes now the Commonwealth defendants, through their counsel of record, and respectfully state and pray:

1. The Commonwealth defendants are concerned with certain proceedings in the case at bar inasmuch as we in good faith deem that said proceedings do not comport with basic tenets of due process of law, such as those embodied in the Federal Rules of Civil Procedure and the Federal Rules of Evidence. These concerns take three forms. First, the Commonwealth believes that the appointment of a Special Master with roving and unrestrained ex-parte investigatory powers is contrary to basic precepts of due process on which a constitutional democracy is based. The Court should note, however, that the Commonwealth defendants have not challenged the propriety of Dr. Helfeld's investigation of itself, but only

the secretive, ex-parte manner in which it is being conducted.[1] As noted in the appellate brief:

. . . the Commonwealth recognizes that at all times Judge Laffitte has exhibited a genuine preoccupation with the Hospital's state of compliance, particularly with respect to the proper funding and the availability of pre and post Hospital services. But this concern, legitimate as it is, has not been accompanied with a corresponding regard for the potential constitutional abuses of an unchecked ex-parte investigation by the Special Master. By authorizing this investigation of the Commonwealth defendants, the master's mission – as presently constituted – extends beyond permissible constitutional bounds, without affording appellants any real mechanism for circumscribing the same to its proper spheres of activities or applicable rules.

This first concern is the object of the Commonwealth's writ of mandamus and appeal to the Court of Appeals to the First Circuit.

2. The second area of concern is the Court's determination, in the absence of a record, that "defendants failed to make any specific objections to the findings and recommendations to Dr. Helfeld's unfinished report." Order of

[1] As we noted on our appellate brief: "The issue on appeal is not whether the district court has the equitable power to reopen a closed case to appoint a Special Master to investigate whether the terms of a final judgment are being complied with, but whether in so doing the Special Master can engage in said fact-finding investigation completely ex-parte, without allowing counsel for defendants the opportunity to be present during the fact-finding sessions, and without even affording defendants' counsel notice of when his clients and other Hospital employees would be questioned or requested to produce documentary evidence."

June 17, 2003. The Commonwealth, very respectfully, did not coincide with said appreciation of the testimony and evidence presented; and, particularly, with the adoption of the findings in the report. The Court should note, first, that insofar as the Special Master's report was made ex-parte and in violation of constitutional due process principles, the Commonwealth defendants contends it is it is null and does not carry any evidentiary weight. This deficiency was further compounded because the Special Master did not submit a copy of the report to the defendants for their comments prior to its filing in court. We respectfully note that it was our understanding that such would be the case and we were therefore surprised to learn that it had been filed without according us the opportunity to comment on what we believe where the erroneous, but correctable, premises and conclusions of the same.

3. The Court, nonetheless, invited the Commonwealth defendants to present evidence at the June 17 conference for it to have "an opportunity to hear and evaluate the defendants' specific objections to the Special Master's report." At the same, all the Commonwealth defendants testified, rejected the finding of budgetary insufficiency, presented an ASSMCA financial statement, announced the establishment of the Secretary's Task Force, and requested thirty (30) days to report to the Court.

4. Given the above, the Commonwealth defendants respectfully disagree with this Court's conclusions that "defendants failed to make any specific objections to the findings and recommendations to Dr. Helfeld's unfinished report." The Commonwealth defendants respectfully submit that said determination is inappropriate both as an

evidentiary matter and as a matter of law. As an evidentiary matter, because the factual averments of the report were shown, in our view, not to be substantiated. As a matter of law, because a judicial finding with respect to a Master's report must be made on the record after an evidentiary hearing, pursuant to the due process guarantees embodied in the Federal Rules of Civil Procedure and the Federal Rules of Evidence, and not merely on a subjective appraisal incapable of judicial review on the record. See, e.g., *Home Box Office v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977) (due process requires all evidence on the record). Accordingly, the request for a transcript of the proceedings is not an act of bad faith; on the contrary, it its demonstrative evidence beyond argumentation that appears to conclusively establish for purposes of judicial review that the district court's adoption of the ex-parte findings of the Special Master was not done on the record.[2] In the absence of findings on the record that allow the judicial review to determine the weight given to the Special Master's findings, it appears that the district court has abdicated in

[2] The Special Master's response is evidence of case in chief of why factual determination and legal conclusions must be based on the record. His response attempts to both recreate and argue the testimony and evidence presented at the conference and evens submits the notes of an assistant, arguably as a record of the conference, Dr. Helfeld, thus, pretends to serve as surrogate for Judge Lafitte, Special Master, party in the action, counsel for Rullán, and reporter for the court, all in one pleading. It is precisely this confluence of self-ascribed roles and functions that due process principles seek to keep distinct. As plaintiffs note in their Reponses, "it would be improper for counsel for the plaintiffs, to start setting up counter recollections of what was said and done on June 17th." This is precisely what the Special Master has done in his Response. This is why a record is required.

Article III function in a surrogate in a manner not countenanced by our constitutional system of law. See *Stabule v. Warrob, Inc.*, 977 F.2d 690 (1st Cir. 1992) (cases cited therein).

5. The Special Master's overreaction to the raising of these legal challenges is the third area of concern. The Commonwealth defendants challenged the ex-parte investigation by the Master and the district court finding in the absence of a record on due process principles which they very respectfully believe they are entitled to for, as we believe this Court is keenly aware, due process of law mandates notice to counsel, opportunity to participate and raise legal challenges, and judicial fact-finding on the record. These contentions, nonetheless, are legal challenges that in their day will be resolved for or against the Commonwealth defendants. We are worried, however, that the Special Master is portraying legitimate expressions over valid legal concerns as bad faith actions inattentive to the basic tenets of ethical conduct. When counsel has raised the due process deficiencies of the investigation, he has been labeled an obstructionist; when counsel requested the transcript to demonstrate the adoption of findings in the absence of a record, he has been threatened with ethical charges.

6. As a citizen-counsel, who represents the Commonwealth defendants both as individual person and as representative of an elected government, who teaches civil rights and constitutional law to future generations of attorneys, who believes in the constitutional principles as articles of personal faith, counsel cannot countenance conduct that to the best of his informed judgment is at odds with basic principles of advocacy, the administration of justice and fundamental constitutional principles of our

democratic society. To the extent that the Special Master cannot discern the principles that motivate advocacy, and respect the space for disagreement within the valid exercise of said principles, he is unjustifiably chilling the Commonwealth defendants and their counsel in the valid exercise of their rights at law. This, from an officer of the court, is harmful to the administration of justice.[3]

7. As things now stand, the Commonwealth defendants are acting in compliance with this Court Order of April 29 and June 17, 2003 pending the petition for writ of mandamus and notice of appeal to the First Circuit. By all accounts, the Commonwealth defendants are cooperating with the Special Master and will continue to do so, legal challenges aside. The Commonwealth defendants pray simply that the Court set aside its finding that the Commonwealth defendants did not oppose the initial report at the June 17, 2003 conference for, as everyone concedes, said finding was not based on evidence on the record. The Commonwealth defendants suggests that the Special Master's findings be held in abeyance until such time as

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[3] See *Navarro Ayala v. Hernández Colón*, 3 F.3d 464 (1st Cir. 1993) (reversing sanctions imposed by Special Monitor). The Special Master now seems to be even claiming that the Department of Justice does not represent Dr. Rullán's position, because in practice he is meeting with the Master. It is improper of Dr. Helfeld to claim to speak for Dr. Rullán. Dr. Rullán "acquiesces" to meet with the Special Master, with the advise of counsel, because there is a court order that requires him to cooperate with the Special Master and he is obliged to do so until the same is stayed or otherwise reversed by the Court of Appeals. Where [sic] he not so obliged, Dr. Rullán would rather work with his own Task Force, alone, and report to the court in thirty (30) days, as he requested at the June 17, 2003 status conference. With or without a judicial officer, Dr. Rullán will discharge his function to the best of his knowledge and capacity.

the Court adopts the same report pursuant to procedures consistent with due process.

Wherefore, it is respectfully requested that the Court take note of the foregoing response and take any action it deems appropriate.

Respectfully submitted.

In San Juan, Puerto Rico, this July 13, 2003.

Anabelle Rodriguez
Secretary of Justice

Ivonne Palerm Cruz
Deputy Secretary for Litigation

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For Defendants-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this same date, a true and exact copy of the foregoing is being served on:

Alejandra Bird, Lady
Suite 720, Mercantil Plaza Building,
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San Juan, Puerto Rico 00918-161

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301(HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

****

MOTION SUBMITTING OBJECTIONS TO SECOND REPORT OF THE SPECIAL MASTER

(Filed Nov. 3, 2003)

TO THE HONORABLE COURT:

COME NOW the Commonwealth defendants, through their counsel of record, and respectfully state and pray:

On October 17, 2003, the Special master in this case filed his second report in compliance with the Court's April 29, 2003 Order in the case at bar, covering the period June 5 to October 10, 2003. Pursuant to the Order of Reference, these are the Commonwealth defendants' objections to the same.

I. OBJECTIOS TO SECOND REPORT

As with the first report, the Commonwealth defendants renew their objection that the absence of due process safeguards that are supposed to accompany judicial processes and fact-finding render the second report unconstitutional ab initio. In particular, the Commonwealth

defendants object to two procedural manifestations of the Special Master's investigation: (a) the ex-parte nature of the fact-finding; and (b) the participation in executive functions.

While Fed.R.Civ.P. 53, grants the district court the power to appoint a master, said appointment cannot be accomplished divorced from the due process rights of notice to counsel, opportunity to timely raise rights and privileges during the course of an investigation, and opportunity for the state government to engage in its executive functions without judicial intervention. The district court should note that these legal arguments have not been rejected by the Court of Appeals for the First Circuit. The Commonwealth defendants have filed three appeals before the Court of Appeals, in cases Nos. 03-1884, 1946 and 1998. The first two appeals were dismissed by the Court of Appeals as premature without entering into the due process issues raised by the defendants. The Secretary has determined to present a writ of certiorari with respect to Appeal Nos. 03-1884 and 1946. The First Circuit, however, has retained jurisdiction over the latter appeal, which concerns the participation by the Master in executive functions of the Hospital. There is no legitimate reason, therefore, to summarily dismiss the Commonwealth due process claims raised by the Commonwealth defendants in this case; or to continue with the mischaracterization of the exercise of appellate and constitutional rights as obstructionist.

These potential due process violations haunt the present report. Except where counsel was expressly notified, we have no way to verify how the evidence accompanying the same was solicited, whether it represents the presentation of individuals or the official

position of the Commonwealth defendants, whether Secretary is aware of the same, whether deliberative and other privileges where sacrificed. The ex-parte nature of the report is further compounded because the Special Master has unilaterally determined to dispense with the provision of the order of reference that allows the defendants to comment on the report prior to its filing with the Court. In sum, the ex-parte nature of the proceedings ethically impedes counsel for the Commonwealth defendants to accept as lawful the findings contained in the report, and by derivation, its conclusions and recommendations. The unfortunate result of these ex-parte proceedings is that the pragmatic collaboration the Commonwealth defendants have always expressed to the Court remains legally unacceptable, despite the best of collaborative good faith, as a matter of constitutional principle.

In addition, the second report confirms that the concerns that motivated this Court to re-assign the Special Master by its Order of April 18, 2003 with respect to potential compliance with the January 28, 2002 Order have not shown themselves to be well-founded. According to the data supplied herein by the Department of Health, the Psychiatric Hospital's budget for 2003-2004 is of $21,429 millions and that of the San Patricio Center is of $3,960,000.00. These exceed the $18.9 million budget required by this Court's Order for the Psychiatric Hospital. The Master, however, has unilaterally expanded his commission beyond verifying compliance with the present budgets to reviewing the adequacy of these budgets and the pre and post hospitalization services provided by ASSMCA. In sum, as originally feared, the initial commission of verifying budgetary compliance, is turning into a reopening of the case.

A. Constitutional Due Process Rights

In general terms, the prohibition against ex parte proceedings by judicial officers is deeply rooted in the constitutional right to due process and a fair trial. See *Home Box Office v. FCC,* 567 F.2d 9, 55 (D.C. Cir. 1977) (without benefit of adversarial discussion among parties, it is difficult to discern truth of decision maker's assertions; inconsistency of secrecy with fundamental notions of fairness implicit in due process and decisiom [sic]-making). *Camero v. United States,* 375 F.2d 777, 781 (Ct. Cl. 1967) (en banc) (due process forbids representative of one party to communicate recommendations to decision makers).

Ex parte information is objectionable for two reasons: first, the immitigable fear that fact-finding will become biased by exposure to only one side of an issue without an adversary's immediate input and opportunity to respond; second, the lack of record for subsequent review of any resulting decision. Thus, as noted by the Supreme Court, when a party's counsel "is under practical restraints in the making of objections and in the tactical handling of his case which would not obtain in trial, scrupulous observance of [established due process safeguards] is clearly of particular importance." *Vitarelli v. Seaton,* 359 U.S. 535, 540 (1959) In those limited instances where ex parte communications have been deemed proper, controls have been placed to ensure that, except in unusual circumstances, the parties have been notified of the proceedings. The classic ex-parte proceeding is the temporary restraining order, which will be granted without written or oral notice to the adverse party only if immediate and irreparable harm will result to the applicant before the adverse party can be heard in opposition. *See Fed. R. Civ. P. 65(b).*

Due process safeguards apply to a Master investigatory proceedings because ultimately the master is a surrogate of the court and is deemed to be assuming "the duties and obligations of a judicial officer." *In re Gilbert,* 276 U.S. 6, 9 (1928) (master's acceptance of appointment means assuming "the duties and obligations of a judicial officer"); *York Int'l Bldg., Inc. v. Chaney,* 527 F.2d 1061, 1068 (9th Cir.1975) (masters are "officers of the court."). Rule 53 expressly allows a special master to proceed ex parte only when a party fails to appear at an appointed time. See *Fed.R.Civ.P. 53(d)(1).* Since canons of judicial conduct, which prohibit ex parte contacts, apply to special masters, the rule presumably defines the only situation in which special masters can proceed ex parte.[1]

Legal precedent with respect to the issue presented is scarce, as the issue is judicially novel. While there are a handful of cases in which the district court have allowed masters certain leeway in the conduct of ex-parte proceedings, none of these cases have confronted the issue directly.[2] The only direct authority seems to be *Ruiz v.*

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[1] The ABA Code of Judicial Conduct for United States Judges, approved by the Judicial Conference of the United States, provides that "[a]nyone . . . who is an officer of a judicial system performing judicial functions, including an officer such as a . . . special master . . . is a judge for the purpose of this Code." The Code further bars ex-parte contacts by judicial officers; "A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties." See Code Of Judicial Conduct For United States Judges (1989) *see also 28* U.S.C. § 455(a); *Jenkins v. Sterlacci,* 849 F.2d 627, 630 (D.C. Cir. 1988) (Masters held to same ethical standards as Article III judges).

[2] See e.g. *Alberti v. Klevenhagen,* 660 F.Supp. 60, 611 (S.D. Tex. 1987) (granting power to conduct confidential interviews but warning that Master is not "to intervene in daily jail operations" and "not to

(Continued on following page)

Estelle, 679 F.2d 1115, 1162-63 (5th Cir. 1982), where the court of appeals determined that an order appointing special masters to supervise implementation of and compliance with the district court's decree was too sweeping. The Circuit determined that insofar as the order permitted the masters to submit to the district court reports based upon his own observations and investigations in absence of formal hearing before him, that provision not only transcended the powers traditionally given masters by the courts of equity, but also denied parties due process of law.

A principal due process concern presents the danger that masters employed in the institutional reform context may be granted wide-ranging powers to examine any material, including privileged material, so long as it may relevant to determining the institution's compliance with the court's decree. These broad investigative powers allow masters to delve into material that is privileged and/or beyond the scope of the decree, can result in greater

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function as inmate advocates, nor . . . to be a roving federal district court."): *NORMAL v. Mullen,* 828 F.2d 536, 539 (9th Cir. 1987) (allowing confidential interviews with "any person associated with the organization"). On the other hand, most commentators agree that although there is a need for flexible, nontraditional powers in monitoring institutions, allowing unlimited, unsupervised contacts with either party undoubtedly affects any findings and conclusions drawn by the special master. See Horowitz, supra note 14, at 1298-99; cf. Berger, Away from the Court House and into the Field: The Odyssey of a Special Master. 78 Colum. L. Rev. 707, 736-37 (1978) (expressing misgivings and possible influences ex parte meetings may have had on findings of special master); McLean, at note 14, at 278 ("ex parte contact by the parties with the special masters . . . had clear potential for abuse and left each side with a vague anxiety that something of consequence might be going on behind its back").

intrusions into an institution's daily operations than required, and potentially expose the defendants to further liability based upon impermissibly obtained information.[3]

B. The Due Process Requirements of Rule 53

Fed.R.Civ.P. 53 regulates the appointment and powers of a special master' consonant with due process principles.[4]

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[3] Under Fed.R.Civ.P. 26(b)(1) material is discoverable only if it is "reasonably calculated to lead to the discovery of admissible evidence" and not privileged. Said privileged information is not discoverable, unless specific conditions are met. See Fed.R.Civ.P. 26(b)(3). After trial, when the threat of a contempt sanction is the primary means of coercing compliance with the decree, granting the special master wide ex-parte investigatory authority creates the possibility that special masters will search beyond normally permissible limits and invites special masters to originate new, incidental charges. Along with broad powers to conduct ex parte interviews, special masters would enjoy free rein over defendant institutions and their officers. See *Arthur Murray, Inc. v. Oliver*, 364 F.2d 28, 34 (8th Cir. 1966) (asserting that judges should not "engage in a prospecting quest for other evidence . . . add to a record, nor appoint a master to make such a discovery pursuit for him"); *Young v. Pierce,* 822 F.2d 1368, 1375 (5th Cir. 1987) (recommending that district court modify order of reference to give defendant protections coextensive with Federal Rules of Civil Procedure); *Ruiz v. Estelle,* 679 F.2d 1115, 1162-63 (finding express constraint required to bar special master's unlimited access to defendant prison since remedial process should not be converted into surrogate forum for new civil rights actions), amended in part, vacated in part, 688 F.2d 266 (5th Cir. 1982), cert. denied, 460 U.S. 1042 (1983); Dobray, supra note 14, at 593-94, 602 (cautioning against conferring sweeping investigative powers upon special master, since master's reports and recommendations may begin to embrace matters far beyond court's original remedial jurisdiction).

[4] See generally Farell, Margaret G., "The Role of Special Masters in Federal Litigation," American Law Institute – ABA Continuing Legal Education 1005 (2002); Comment, Force and Will: An Exploration of the Use of Special Masters to Implement Judicial Decrees, 52 U. Colo. L.

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It provides that "a reference to a master shall be the exception and not the rule" and "a reference shall be made only upon a showing that some exceptional condition requires it." *Id.* at 53(b). Rule 53(c) contemplates that the powers of the master shall be consonant with the requirements of due process insofar as it contemplates that its fact-finding proceedings will be pursuant to formal hearings and request for production of documents. Thus Rule 53(c) provides that "[t]he order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or *to receive and report evidence only* and may fix the time and place for *beginning and closing the hearings* and for the filing of the master's report." It further provides:

> Subject to the specifications and limitations stated in the order, the master has and *shall exercise the power to regulate all proceedings in every hearing* before the

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Rev. 105 (1989); Wayne D. Brazil et al., eds., A Practical Guide To The Use Of Special Masters, (1985) ("Managing Complex Litigation"); McLean, Pre-Trial Management in Complex Litigation 275 (1985), in Brazil, supra; Levine, The Authority for the Appointment of Remedial Special Masters in Federal Institutional Reform Legislation: The History Reconsidered. 17 U.C. Davis L. Rev. 753 (1984); Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions. 1983 Duke L.J. 1265 (11983) [sic]; Dobray, Masters in Court Ordered Institutional Reform, 34 Baylor L. Rev. 581 (1982): Nathan, The Use of Special Masters in Institutional Reform Litigation, 10 Toledo L. Rev. 419, 420 (1979); Special Project, The Remedial Process in Institutional Reform Litigation, 78 Colum. L. Rev. 784, 826-27 (1978); Silberman, Masters and Magistrates Part 1: The English Model, 50 N.Y.U. L. Rev. 1071, 1075-79 (1975); Silberman, Masters and Magistrates Part II: The American Analogue, 50 N.Y.U. L.Rev. 1297, 1321-1323 (1975); Kaufman, Masters in the Federal Courts: Rule 58 Col.L.Rev. 452 (1958).

> master and to do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. The master may require the production before the master *of evidence upon all* matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master *may rule upon the admissibility of evidence* unless otherwise directed by the order of reference and *has the authority to put witnesses on oath and may examine them and may call the parties to the action and examine them upon oath.* When a party so requests, *the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in the Federal Rules of Evidence for a court sitting without a jury.* (Emphasis supplied).

Rule 53(d)(1), in turn, regulates the proceedings before a master. It contemplates that meetings shall be after notice to parties and their attorneys. It provides in its relevant parts:

> When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, *the master shall forthwith set a time and place for the first meeting of the parties or their attorneys* to be held within 20 days after the date of the order of reference and *shall notify the parties or their attorneys.* (Emphasis supplied).

Under Fed.R.Civ.P. 53(d)(1) a master is authorized to proceed ex-parte only "[i]f a party fails to appear at the time and place appointed "but has the discretion to "adjourn the proceedings to a future day, giving notice to the absent party of the adjournment." Revealingly, the master is empowered to call witnesses, but pursuant to the

safeguards of the Federal Rules of Civil Procedure.[5] The failure of witness to attend a citation is punishable by contempt. *Rule 53(d)(2).* The due process safeguards of Rule 53 are further evidenced by the requirement, in an action to be tried without a jury, that "the master shall file with the report a transcript of the proceedings and of the evidence and the original exhibits." *Rule 53(e)(1).* Finally, Rule 53 recognizes that the fact-finding shall be given significant weight, for in "an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous." See footnote 10.

The foregoing review of Rule 53 demonstrates that master proceedings incorporate due process safeguards at all critical junctures of the fact-finding process. As noted in the Manual for Complex Litigation, supra note 14, § 21.52, at 100 (1985): "The master's findings must be based upon evidence presented at a hearing conducted essentially like a trial, with subpoena powers enforceable through the court." See note 14. Rule 53 and the 1983 amendment to the same are intended to incorporate the rules of evidence. *Id.* § 21.54, at 100.

The order of reference of 1985, which the court incorporated in its reappointment of Dr. Helfeld, is not inconsistent with the due process safeguards of Rule 53. See Add. 19-25. The master is required to formalize meetings

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[5] "The parties may procure the attendance of witnesses before the master *by the issuance and service of subpoenas as provided in Rule 45.* If without adequate excuse a witness fails to appear or give evidence, the witness *may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.*" Fed.R.Civ.P. 53(d)(2).

with "the parties and/or their attorneys at the earliest date convenient." ¶ 6(b), Ap. 20. The master shall develop evaluation systems to measure the extent of defendants' compliance with the standard of the decree, "in consultation with defendants and plaintiffs' counsel." ¶6(c), Ap. 20. While the order of reference grants the master "access to all facilities, records, documents and persons affected by or involved in the implementation of this decree for the purpose of gathering information relevant to the enforcement of the decree" ¶6(f), this access is neither expressly ex-parte, nor without notice to the parties and/or the counsel, and much less without opportunity for counsel to be present.

In the present case, these due process concerns have already become a reality. The Special Master's ex-parte proceedings do not allow the appellants to know or challenge the contents and reach of the interrogation of persons and the production of documents; so there is no way of knowing whether he is infringing upon deliberative privileges, attorney work-product or attorney-client relationships, among others. In the absence of counsel, the Commonwealth defendants are being co-opted, pressured or intimidated into reaching agreement with Dr. Helfeld that exceed the investigation of compliance and which overstep into the Hospital's administration and the state's public policy formulation and/or implementation. Such is the case with the Master's latest attempt to compose a joint Master Group – DOH Task Force to jointly oversee Hospital operations and review Commonwealth and federal mental health public policy. The Special Master's ex-parte investigation threatens not only the rights of the Commonwealth defendants as person, but also constitute

an improper intrusion into governmental functions that properly belong to the Commonwealth.

III. CONCLUSIONS

The due process deficiencies of the Special master s [sic] second report do not allow the Commonwealth defendants to accept its findings and hence, to accept its conclusions and recommendations.

WHEREFORE, for the foregoing reasons, the Commonwealth defendants present their objection to the second report of the Special Master and request that its recommendations not be judicially adopted in the absence of a hearing.

Respectfully submitted, in San Juan, Puerto Rico this November 3, 2003.

Anabelle Rodriguez
Secretary of Justice

Ivonne Palerm Cruz
Deputy Secretary for Litigation

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this same date, a true and exact copy of the foregoing is being served by certified mail # ___.

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UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
	*	**Civil No. 74-1301 (HL)**
Plaintiff,	*	
	*	
v.	*	
	*	
GOVERNOR OF PUERTO RICO et al.	*	
	*	
Defendants.	*	

* * * * * * * * * * * * * * * * * * * *

MOTION REQUESTING THE COURT TO SANCTION DEFENDANTS' COUNSEL, ATTORNEY CARLOS DEL VALLE CRUZ, FOR PROFESSIONAL MISCONDUCT

(Filed Nov. 14, 2003)

TO THE HONORABLE COURT:

This is to inform the Court that on advice of counsel defendants once again reverted to conduct which obstructed the Special Master from effectively carrying out his assigned duties as defined in the Court's Orders of April 29 and June 18, 2003, and to request that defendants' attorney, Mr. Carlos Del Valle Cruz, be sanctioned for failure to counsel defendants against engaging in obstructionist conduct to the detriment of the Special Master's court-assigned investigation. This particular professional misconduct by attorney Del Valle should be evaluated, when determining appropriate sanctions, in the context of his record of violations of Rule 11 of the Rules of Civil Procedure and other professionally unethical misconduct in which he has engaged almost from the start of the Court ordered investigation. In the account of attorney

Del Valle's record of professional misconduct, this motion starts with the latest example: his failure to advise defendants against denying the Special Master unhindered access to information and reports relevant to his assigned investigation.

I. The October 28, 2003 Violation

Up to the present date, there have been two cycles in which defendants and their officials and employees have freely and cooperatively responded to the Special Master in interviews requesting information, and with documents and reports related to his assignment as defined in the Court's Orders, followed by defendants' obstructionist conduct, carried out directly by defendants' attorney, Mr. Carlos Del Valle, or by defendants on the basis of a decisional process in which he participated.

The first cycle of cooperation, followed by obstruction, is fully described in the Special Master's First Report, dated June 4, 2003. From April 29 until May 21, 2003, there was complete cooperation by all employees and officials at all levels of authority, in which they provided all requested information and documents. This changed totally on May 22 when Defendants' counsel, attorney Carlos Del Valle, blocked an interview which I had scheduled with ASSMCA's Administrator, Dr. Dalila Aguilu, and her financial staff. He informed me that he was taking an appeal to the First Circuit and that henceforth I could not talk to any of the defendants or their employees, or request documents, except through him acting as their attorney. This had the effect of making it impossible for the Special Master to submit to the Court a full and complete report. The period

of obstruction of access by the Special Master to information and documents ended with the Court's Order of June 18 which made plain that the "Court expects the defendants' full cooperation with the Special Master's investigation."

From that date until October 28 there has been full cooperation which is described in the Special Master's Second Report, dated October 15, 2003. Deviation from something less than full cooperation was adopted on October 28, in a meeting in which were present the Secretary of Health, his Special Assistant, attorney Carmen Graulau, Defendants' counsel, attorney Del Valle and key officials of the various components which make up the mental health system. The new policy apparently was adopted orally and precisely how it was phrased is less than clear because my informants did not describe it in identical terms. It is best understood, in my judgement, by how it was carried out.

The first indication I had of a change in policy was a call I received on October 29 from my assistant, Ms. Leticia Villalon Soler, to the effect that she and my associate, Dr. Nectar Torregrosa. had visited the Trujillo Alto "Sicosocial", after previously scheduling the visit, and were informed by its Director, Mrs. Valles, that she had been instructed by Special Assistant Graulau that she could not permit them to meet with the staff, as had been done on previous visits. What was now required was preliminary clearance by Special Assistant Graulau. Just a week earlier, Dr. Torregrosa and Ms. Villalon had met with the staff of the Cayey "Sicosocial" with no difficulty at all and without requesting clearance from any ASSMCA official. What was intended by preliminary clearance was not

made clear to me. Nor was I consulted or oriented about the new policy which took me and my staff by surprise.

The second indication involved a number or [sic] reports related to the functioning of the "Hogares" which its director, Ms. Mayra Rivera, promised to have photo copied and which were to be picked up by my assistant. On October 29, Ms. Rivera called my assistant to inform her that she had been instructed by Special Assistant Graulau to send the documents to her office where I could receive them. When my assistant called, she was informed that Ms. Graulau was reviewing the documents. When she called again on November 3, she was told that until Ms. Graulau could meet with Ms. Rivera to discuss the documents, they could not be made available. It took ten days for the documents to be released and then only after the Secretary's intervention.

The third version of the new policy, given to me by officials of the Psychiatric Hospital, was that reports which I requested them to make in the future would be submitted first to the Secretary of Health and he would then make available copies to me.

The fourth response, given by the Secretary of Health, when I met with him on November 3rd, was that the manner in which the new policy was being implemented was not in accord with his intentions, that the intent was to insure simultaneous transmission to the Special Master and to him or to his designated delegate.. When I described to him how Special Assistant Graulau was in fact implementing the new policy, he reacted at once to rescind it and, in my presence, phoned Ms. Graulau to notify her of his decision and instructed her to inform all affected ASSMCA officials that the prior policy was again in effect

of unhindered access by the Special Master to personnel and documents. When asked why the change was instituted, his answer was that a key exhibit in my second report, Exhibit "H", dealing with the shortfall of two millions in the Psychiatric Hospital's budget, had been submitted to me, but that he was unaware that a copy had been made available to him. I reminded him that I had personally discussed the two million shortfall with him, prior to preparing my second report. that the document had been prepared principally by a financial officer of ASSMCA and that I had assumed that she would give a copy to Ms. Graulau. Further, the exhibit was known to Mr. Jose Rodriguez Bon, the Chief Financial Officer of the Department of Health. No other exhibit was mentioned as not having been made available to the Secretary or to Ms. Graulau.

In my meeting with the Secretary, I reminded him of the practice of full disclosure that I had followed. Any information at all pertinent to the case which I received, as well as documents prepared by my staff, were always made available to the Secretary and to the Joint Task Force. In addition, all officials and employees from whom I requested that reports be prepared were told that copies should be made for submission to the Secretary or to his Special Assistant. These practices were implemented because I was convinced, and remain convinced, that transparency is the right course to follow and serves to encourage defendants' expedited compliance with the Court's Orders. In the same vein, visits to the San Patricio Center or to the "Sicosociales" were always preceded the day before by a telephone call *so* that their respective directors could inform Special Assistant Graulau. There have been no surprise visits and, I assume, no visit about

which she has not been informed. Hence, I was surprised by the change in policy of unhindered access, and especially by the fact that it was put in practice without my having the opportunity to discuss the change or to be notified of its adoption.

The obstructive effect of the policy adopted on October 28 was short-lived, due to the corrective action taken by the Secretary of Health in response to my *objections*. That, however, cannot excuse attorney Del Valle who as Defendants' counsel participated in the meeting which formulated the change from the policy of full cooperation. It is reasonable to conclude that he agreed with, and contributed to, the decisions taken in that meeting. In so doing, he failed in his duty to his clients and to the Court.

First, he had the duty to advise defendants in the meeting that the proposed new policy was illegal, since it would conflict with the policy of unhindered access to persons and documents and, as well, the explicit authorization to require reports, as defined in the terms of reference to the Special Master, incorporated in the April 29, 2003 Order. This is clearly spelled out in Sections 6-f and 6-d of the terms of reference: "The Master shall have access to all facilities, records, documents and persons affected by or involved in the implementation of this decree for the purpose of gathering information relevant to the enforcement of the decree" and "the Master may require defendants to file with him factual reports. . ."

Second, he should have advised defendants that the proposed changes in the Special Master's unhindered access to informants and to his authority to require reports, without their prior intervention, were illegal since they were in conflict with the "full cooperation" required

by the Court's April 29, 2003 Order. Full cooperation had functioned for five months without there having been a single complaint to the Special Master by defendants about how he was carrying out his work. It is true that attorney Del Valle has submitted to the Court his objections to the appointment of a Special Master and to the information gathering procedures of this Special Master. But his objections were denied by the Court and his appeals to the First Circuit were dismissed. Under such circumstances it is elementary that an attorney respectful of the Court's lawful authority is duty bound to advise his clients to obey the Court's Orders, and to obey them himself, until such time that he can mount a successful challenge on appeal.

Third, he should have advised defendants that they do not have authority to change court-ordered directives unilaterally. If defendants believe that the Court's Orders violate their rights, either inherently so or because of how the Special Master is implementing those orders, their only recourse is to raise such issues before the Court, to petition for relief, and if unsuccessful, to appeal. Attorney Del Valle should have advised defendants that to act on their own initiative to change the terms of the Court's Orders, without prior notice of any kind, would be considered an act of defiance of the Court's authority.

For these three failures in his duty to defendants and to the Court, attorney Del Valle should be held to account. His failures were not only in violation of the Court's Orders, but also contributed to the creation of needless insecurity and unease among defendants' employees in responding to requests for information and reports by the Special Master, when no such feelings had been manifest before.

In the case of the Secretary of Health. I do not feel that any action by the Court is needed. From the way he rescinded the new policy of access by the Special Master in response to my objections, I am convinced that if he had been properly advised by counsel, there would have been no change in policy. I continue to have confidence that the Secretary is committed to complying with the Court's Orders and that he recognizes that the best way to proceed is by maintaining a relationship of mutual trust and openness with the Special Master.

For the Court to determine appropriate sanctions in the case of attorney Del Valle, it is submitted that the three failures in his duty to defendants and to the Court should be evaluated in the context of the pattern of professional misconduct in which he has engaged almost from the outset of the court-ordered investigation. That pattern of misconduct also serves as an independent ground for the imposition of sanctions. An account of the pattern of his professional misconduct follows.

II. THE RECORD OF PROFESSIONAL MISCONDUCT PRIOR TO OCTOBER 28, 2003

In attorney Del Valle's motions, appeals, briefs and other communications for which he is responsible, there is palpable evidence of reckless disregard for truth, creation of conceptual confusion, gratuitous defamation, irresponsible and exaggerated assertions and burdening of the record with efforts to retry disputes in the case which were resolved well over a decade ago. As might be expected, his record of professional misconduct has been detrimental to efforts to expeditiously resolve the substantive issues in this case.

Attorney Del Valle's record demonstrates in abundant detail that he has violated two of Rule 11's prohibitions against filing motions and other pleadings for an "improper purpose, such as to harass or to cause unnecessary delay", or making "allegations and other factual contentions" without having "evidentiary support". Both types of violations were committed by attorney Del Valle, the record will demonstrate, without his having satisfied Rule 11's test that he truthfully represent to the Court that he was "certifying that to the best of the person's knowledge, information and belief, formed after an inquiry reasonable under the circumstances" that his pleadings had no improper purpose and that his factual allegations had evidentiary support. The record will further demonstrate that attorney Del Valle's pattern of misconduct has been so egregious and so motivated by deep-seated animosity toward the Court and the Special Master that the monetary sanctions called for by Rule 11 are unlikely "to be sufficient to deter repetition of such conduct" in the future and, therefor, remedial measures are also called for, in addition to monetary sanctions, in order for this case to be resolved without this Court and the First Circuit Court of Appeals having to continue to deal with his unprofessional misconduct.

A. Reckless Disregard for Truth

In Defendants' June 23, 2003 Second Amended Notice of Appeal, which attorney Del Valle signed and for which he is responsible, there was requested from the Court transcripts of the March 18 and June 17, 2003 Status Conferences. To make such a request in the context of an appeal, was characterized as the "essence of bad faith" in my response, made in compliance with the Court's Order of

June 26, 2003, requesting my comments, since attorney Del Valle knew full well that in neither Status Conference was a transcript taken. Counsel for Plaintiffs in his response of July 8 confirmed that no transcripts were taken. My response also stressed that the matter needed to be clarified lest the Appellate Court be left with the erroneous impression that the District Court had in its possession stenographic records which it refused to make available to Defendants and concluded that if the purpose was to mislead the Appellate Court, it would run afoul of the ethical norms attorneys are duty bound to follow when filing motions and appeals. In its July 15 Order, the Court confirmed that no transcript of the Status Conferences had been taken by a court stenographer.

Attorney Del Valle's conduct can be characterized appropriately as reckless disregard for the truth or, in the alternative, as the purposeful intent to deceive the Appellate Court about the existence of transcripts, knowing of their non-existence, in the context of a dispute with the District Court over what transpired in the course of the June 17 Status Conference. However characterized, the conduct of Defendants' counsel surely qualifies as a violation of Rule 11. It should be recognized that the violation encompasses an injury committed against both the District Court and the Court of Appeals.

The possibility that attorney Del Valle incurred in good faith error was eliminated by his subsequent actions. On July 2, he filed Defendants' petition for a writ of mandamus in which he continued to insist on the existence of transcripts of the two Status Conferences. In his brief, at page 31, he states that with respect to the June 17 Status Conference Defendants "requested that the record of the conference be transcribed and be made part of the record

on appeal". The fact is that at no time was there a request to have the record transcribed in the course of either Status Conference. The statement in the brief, unless corrected, could have led the Appellate Court to believe erroneously that the District Court had available a court stenographer's notes which could have been transcribed at a party's request. The fact that the Appellate Court may not have been misled, does not excuse attorney Del Valle's unprofessional conduct. Nor does its decision to dismiss Defendants' appeal and petition for writ of mandamus. As I see the violations of Rule 11, it is not simply a matter of sanctioning past misconduct, but of taking steps to insure that such misconduct will not continue to adversely affect efforts to resolve this case expeditiously.

Demonstrative of attorney Del Valle's bad faith in this matter is the fact that in the case's record after July 1 he has made no effort to correct, explain or excuse his insistence on the existence of transcripts which he knows were not made because no stenographic record was taken in either the March 18 or June 17, 2003 Status Conferences. His conduct in this matter is precisely the type calling for disciplinary action under Rule 11.

In both Defendants' brief in support of their petition for the writ of mandamus and, as well, in their "Emergency Motion For Stay of Special Master's Co-Administration of Psychiatric Hospital", attorney Del Valle seeks to convince the Appellate Court that the Special Master is co-administering the Psychiatric Hospital together with the Secretary of Health. In the brief, at page 22, he speaks of "geared toward the co-administration of the Hospital" and in the Emergency Motion co-administration is alleged with no qualifications. Both charges are false. They were made to convince the Appellate Court that the Special Master

had run amok, was illegitimately exercising executive authority in the management of the Hospital and that his unlawful conduct, aided and abetted by the District Court, could be remedied only through extraordinary remedial relief by the Appellate Court. Of course, if the factual premise for Defendants' argument was false, the petition for extraordinary relief would fall of its own weight.

There are two possible explanations for attorney Del Valle falsely asserting that the Special Master was co-administrating the Hospital: that he knew that it was false, but asserted it despite its falsity because it buttressed his petition for extraordinary relief, or that he failed to make reasonable inquiries to determine whether it was true or false. If the second alternative explains his conduct, it is a clear example of reckless disregard for truth. If it is the first alternative, the misconduct is doubly serious because it would amount to an attempt to deceive the Appellate Court for the purpose of inducing it to act on the basis of the purposeful misrepresentation of a fact critically important to the outcome of the petition for extraordinary relief.

If attorney Del Valle had made reasonable inquiries, for example, by simply asking the principal defendant, his own client, the Secretary of Health, he would have learned that there was not a word of truth about co-administration of the Hospital. At all times the Hospital has been governed by the officials appointed by the Secretary of Health, who respond directly to him, and at all times he alone has made all key personnel appointments and policy decisions. For example, it was the Secretary who decided to reappoint the Hospital's Medical Director and who recruited its new Executive Director and it was the Secretary who decided that pressing problems being faced by the Hospital

and the San Patricio Center should be attended to immediately without waiting to determine whether their respective budgets made specific provisions for those problems.

Attorney Del Valle is confused about how the Joint Task Force functions because he chooses to appear to be confused. The facts are that it was proposed by the Special Master, as authorized under the terms of reference: "The Master may make informal suggestions to the defendants, in whatever form he deems appropriate, which in his opinion will facilitate compliance with the decree." The proposal was accepted by the Secretary and has indeed served to facilitate affirmative efforts to comply with the Court's Orders. The Joint Task Force consists of the Secretary's Task Force, which he heads, members of his staff, the Hospital's Medical Director and its Executive Director, to which there has been joined the Master's Group which consists of the Special Master, his associate Dr. Nectar Torregrosa, and after August an administrative assistant. All members of the Joint Task Force understand that it has no executive authority to administer or to make policy decisions involving the Hospital, San Patricio Center or any facility managed by the Department of Health or ASSMCA. Its functions are to gather pertinent data, analyze it and propose solutions which will serve to restore both institutions to their former level of effective functioning. It is the Secretary, in his dual capacity of Secretary of Health and Administrator of ASSMCA, who decides if, when and how to implement the work product of the joint Task Force. There is every reason to believe that attorney Del Valle was fully aware of how the Joint Task force has been functioning, notwithstanding his untrue and misleading statements made in his motions, petitions and in his brief. As the Secretary of Health stated to me,

he has kept him informed, as defendants' counsel, of how the Joint Task Force has been working and of what it has achieved. In addition, there is nothing in the record to indicate that attorney Del Valle has been unable to receive whatever information he requires from any of the Defendants.

As in the case of his false description of how the joint Task Force functions, attorney Del Valle regularly misrepresents the facts with untrue assertions whose accuracy he could easily have checked. Thus, in the brief in support of the petition for the writ of mandamus, at page 19, it is stated that the Special Master "has composed a Master's Group of mental health professionals", seeking to convince the Appellate Court that something on the order of the interdisciplinary team which the Special Master formed during his first tour of duty was being instituted anew for the purpose of co-administering the Hospital. As indicated before, he need only have inquired of the Secretary of Health to have learned that the Master's Group consisted at that time of two persons, the Special Master and Dr. Torregrosa, that the joint Task Force was not intended to, nor did it, exercise administrative functions and that its work plan had adopted the time frame of the Court which sets December 31, 2003 as the target date for coming into complete compliance. Had he so inquired, he then could not have made the assertions he did, but that would have undercut his petition for extraordinary relief. To have had any chance of success, he had to mislead the Appellate Court.

The same pattern of misconduct is evident in how the brief, at page 16, seeks to prove what is completely false, *i.e.*, that the Special Master has plans to retire from teaching to assume the functions of a full time mastership.

The brief states: "The trigger for the appeal ... was information – admittedly ex-parte and not on the record – that Dr. Helfeld would retire from his tenured teaching position on June 30, 2003 to return to the Hospital and reassume his prior tenure as full-time master there, independently of appellants' factual demonstrations." The purpose of the quoted statement is obviously to convince the Appellate Court of the Special Master's evil design to exploit the mastership to enrich himself. To achieve that purpose, attorney Del Valle had to engage in a remarkable number of falsehoods and misstatements of fact. The same assertion was made for the first time, orally, in the June 17 Status Conference and attorney Del Valle attributed it to a named informant, the former executive director of the Hospital. I responded that the statement was false and informed the Court and those present that I had recently met with the Dean of the Law School to arrange for my complete teaching assignment for the academic year beginning in August. I urged attorney Del Valle to call the Dean to verify my statement. He never did and continued to repeat the same falsehood in his mandamus brief. His failure to inquire surely qualifies as reckless disregard for the truth.

To set the record straight, I am 81. which is well beyond the tenure age limit. I continue to teach at the discretion of the University of Puerto Rico. Finally, the Special Master's position was never full time, nor could it possibly be so considered now when the objective is restoration of the Hospital to full compliance, within a target date of six months, a viable goal considering that its deterioration only reflects the experience of the last fifteen months. To this there should be added the all important fact that the Secretary of Health has manifested to the Court his

readiness to fully cooperate. This should be compared with the situation in 1985 when it was necessary to start from scratch with a Hospital which was almost in total violation of all acceptable psychiatric norms and constitutional principles and which would require in depth institutional reforms over many years, involving cycles of resistance and compliance by Defendants, in order to comply with the manifold requirements of the consent decree.

The most troublesome aspect about attorney Del Valle's explanation of what triggered the decision to appeal is what it reveals about the state of his mind. Does a responsible counsel decide to take an appeal on the basis of malicious gossip whose truth or falsehood he can easily verify? If he were going to use the testimony of an anonymous informant, should he not at least have checked out its veracity? Would he cite the words of an anonymous informant? Could he be so confused as to the usage of the term ex-parte as to use it to describe an allegation he received from an anonymous informant? These questions serve to highlight how far removed attorney Del Valle's misconduct is from what is acceptable professional conduct. It is fair to conclude that the explanation for his misconduct is that he is blinded by personal animus against the Special Master.

B. Conceptual Confusion Sown to Divert Attention from the Substantive Issues

In none of his many motions and appeal petitions does attorney Del Valle face up to the substantive merits for the Court's determination to order an investigation, nor does he address the findings of deterioration in the functioning of the Hospital or the San Patricio Center, as set forth in

the Special Master's First Report. Instead, all his objections are procedural in nature and the terminology he employs is peculiarly his own and hence causes confusion. There has already been considered his misuse of the term administration to characterize the role of the Special Master in the Joint Task Force, regardless of the facts, as if by repeating the label co-administration and asserting its existence, that would make it so. Consider now his use of the term ex-parte, which is peculiarly his own, and therefor can only cause confusion. In common usage by judges and lawyers, ex-parte refers to a judicial officer meeting with one party to a law suit to discuss matters relevant to the case, without the other party being present or having given consent to the ex-parte meeting. When it occurs in a law suit or criminal proceedings, it would violate procedural due process. By repeatedly applying the term ex-parte to the investigative practice of the Special Master, attorney Del Valle causes confusion by erroneously equating investigative interviews with the process for finding facts in administrative and judicial hearings.

The truth of the matter is that attorney Del Valle does not really believe that it is a violation of due process for the Special Master to interview defendants and their employees without the presence of their attorney. On April 30, the first day the Special Master began the investigation, with scheduled interviews of ASSMCA's Administrator, the Hospital's Medical Director and the Director of the San Patricio Center, attorney Del Valle did not appear, but rather sent his assistant, Ms. Linda Navedo, for the purpose of taking notes of my questions and the answers of those being interviewed. I rejected his proposed format because I was convinced that having his assistant taking notes would not be conducive to open and uninhibited

answers by government informants. The important point to be stressed is that though attorney Del Valle claimed that there was a due process right to be present, he was prepared to settle for something appreciably less, the right to have present his designated note taker.

In none of his motions or appeals, does attorney Del Valle respond to past practice or legal arguments which were made starting with the Special Master's First Report on why his due process claim was without merit: During the first mastership it was regular practice to gather information from informants without either party's lawyer being present. That fact alone is not decisive. What is decisive is how the Special Master's report is treated once it reaches the Court:

> The findings and recommendations of the Special Master's reports are not automatically accepted by the Court. They must run the gauntlet of the objections by the parties affected who have every right to challenge whether its factual conclusions are based on substantial evidence, whether there is evidence in refutation, whether his opinions and recommendations are well grounded, as well as whether there are constitutional and jurisdictional claims they feel should be considered. After hearing the parties, including taking into account any evidentiary hearing it might find to be necessary, it is the Court which decides the weight to be given to the Special Master's report. Once it is recognized that Defendants will have their day in court, with unfettered opportunity to criticize the Special Master's report and to defend their legitimate interests, their claim of procedural unfairness is simply without merit. It is certainly significant that in all their motions relying on due process objections, not once do

> defendants cite a single case in support of their legal argument. (First Special Master's Report, pages 11-12)

There simply is no legal basis for the argument that there is a due process right to have an attorney present at every investigative interview which is conducted by a special master.

When similar issues were raised in 1992, they were rejected by the Appellate Court, as noted in the First Circuit's decision to dismiss Defendants' appeal and petition for the Writ of Mandamus. Judgment Entered July 21, 2003, Case Numbers 031884, 031885. See also *Navarro Ayala et al. v. Governor of Puerto Rico*, 956 F. 2d 348, 357 (1992).

But the most telling argument against accepting the due process claim is that it would make impractical investigations of the type ordered by the Court. Consider how the claim would work in practice. If counsel for plaintiffs have a right to be present in the interview on grounds of due process, how could opposing counsel be denied the right to be also present? To compound the problem, with attorneys present would they have the right to make objections on which the Special Master would then have to rule? The result would be to turn every investigative interview into a formal hearing which, in turn, would make the investigative process one of interminable delay and therefor of limited or no utility. To imagine the due process claim being implemented in court-ordered investigations, in the context of an institutional case, as advocated by attorney Del Valle, is reason enough to reject its pretensions.

An equally telling argument against accepting the due process claim is the fact that at no time did attorney Del

Valle demonstrate that any person, whether official or. employee, had suffered any concrete harm from answering my questions or from providing requested documents. His claims of injury to persons are all general and ambiguous or of potential injury if the Special Master's investigation should exceed the parameters of the Court's Order of January 28, 2002. But there are at least two remedies for dealing with claims that the Special Master is exceeding his authority: objections can be made to the Special Master's reports at the time they are reviewed by the Court or in advance of his reports if his actions are considered to be egregiously harmful to the lawful authority of the Commonwealth.

It is the latter point, the federalist issue rather than the due process claim, which does merit consideration. The answer to the federalist issue is that it merits full respect by the Court, but it cannot outbalance the respect which federal constitutional rights must be accorded to persons receiving mental health treatment in facilities operated by the Commonwealth. If there is a conflict between claims of federalism and individual constitutional rights, it is the former which must give way to the latter as required by the supremacy clause of the federal constitution. Nonetheless, the Court has shown its respect for Commonwealth's federalism concerns by fixing as the target for coming into compliance the date of December 31, 2003. But of course for it to be achieved depends on the good faith efforts of defendants, their counsel and of the government under which they serve.

Unfortunately, attorney Del Valle does not take the Court at its word. He is convinced that there is a hidden plan to establish a long-term mastership along the lines which was established in 1985, which lasted twelve years and

which included a five person interdisciplinary group. It is his conviction that the Court is acting in bad faith, aided and abetted by his choice of Special Master, which in my view account for his reckless disregard for truth, the twisting of legal concepts and facts and his determination to obstruct relations of collaboration between the Special Master on one side, and on the other, the Secretary of Health and those working under his supervision. The fact of the matter is that attorney Del Valle has contributed nothing affirmative to the resolution of the substantive problems in this case, nor has he shown any interest in whether mental health patients are being treated in compliance with constitutional principles.

There is a highly significant fact which is peculiar to this particular case. The actual defendants who are responsible for providing mental health services, and their employees as well, have provided information freely, demonstrating by their openness that they wanted the facts and causes for the deterioration of the Hospital and the San Patricio Center to be exposed. In contrast, their attorney, designated by the Secretary of Justice, has sought to impede discovery of the truth about the deteriorated conditions, in the name of a due process right which his clients are not claiming. One after another attorney Del Valle's legal claims have been denied at the level of the District Court and have been dismissed at the level of the First Circuit Court of Appeals, whether they were constitutional, jurisdictional or equitable in nature. This in itself would not justify the conclusion that he has engaged in professional misconduct. An attorney is entitled to wide latitude in fashioning how he develops his case in the interest of his clients. But in this institutional case, the question is whether attorney Del Valle has passed the outer limits of

acceptable advocacy, when advocacy gives way to the manipulation of legal concepts for the purpose of obstructing the search for understanding why the Hospital and the San Patricio Center have suffered such manifest deterioration in so short a period of time and for the purpose of obstructing the development of a plan for remedial action to restore both entities to their former quality of service.

In my opinion, attorney Del Valle's litigation record thus far more than justifies that he be held accountable for his professional misconduct. If not held accountable, there is every reason to believe that he will continue to raise all kinds of issues without merit, for the purpose of obstructing an expeditious resolution of this case on its merits. That belief is more than warranted by his conduct following the October 15, 2003 Second Report of the Special Master, as exemplified by his failure to properly advise the Secretary of Health in the October 28 meeting *(supra,* Section I) and his November 3 "Objections to the Second Report of the Special Master" *(infra,* Section III). In the material which follows consideration is given to a number of additional examples of professional misconduct by attorney Del Valle and to the probable explanation for his motivation.

C. Instances of defamation, insistence on burdening the record with disputes long since resolved and irresponsible and exaggerated assertions

At page 5 of the Special Master's First Report mention is made of the exception which was allowed to ASSMCA's Administrator to have her legal consultant, attorney Rita Rodriguez Falciani, accompany her in the interview. The

reason given for the exception was "because of the information she might provide." At page 14 of his Mandamus Brief, attorney Del Valle has this comment to make: "Dr. Helfeld omits mentioning that Rodriguez was his Deputy Monitor. . . . She is conceivably, metaphorically speaking, a veritable Trojan horse." In effect. attorney Del Valle has called into question attorney Rodriguez' loyalty to ASSMCA's Administrator. The Trojan horse allusion implies trickery and deceit. Attorney Del Valle does not identify any source for his comment which is simply a piece of gratuitous defamation which he can express without fear because it is uttered in the context of an ongoing litigation. The question is why did he feel the need to drag her into his brief in this derogatory fashion? She is not even a secondary protagonist in this case.

The most likely explanation in my opinion is that attorney Del Valle bears a personal grudge against the professionals who made up the interdisciplinary team of the Special Master, and attorney Rodriguez was especially dedicated in her efforts to bring the Psychiatric Hospital into compliance with the consent decree. Though she was the trusted legal advisor to ASSMCA's Administrator, he finds it necessary to denigrate her in his brief. He does not see any value to the contribution she made as Deputy Special Master to bringing the Hospital to the level which would satisfy the standards of the accreditation agencies. That achievement is blocked out in his mind which concentrates only on what he deems the unforgivable invasion of the Commonwealth's authority. Nor does he show any respect for what is by any standard a distinguished career in the field of mental health: she was on the teaching staff of the Puerto Rico Institute of Psychiatry; she is presently teaching in the School of Public Health on the Medical

Science Campus of the University of Puerto Rico; she was one of the principal draftspersons in the drafting of the Mental Health Act; sheds legal advisor to Triple S, Inc; and she started her career in mental health as an occupational therapist employed by the Psychiatric Hospital.

Some time after attorney Del Valle's Trojan Horse allusion, the Secretary of Health designated attorney Rodriguez Falciani to be a member of the Joint Task Force which advises him on measures needed to restore the Hospital and the San Patricio Center to their former effective levels. Attorney Rodriguez' designation speaks to the Secretary's judgment of her professional and personal qualities, as contrasted with Defendant's attorney's resort to gratuitous defamation for the purpose of malicious injury to her professional career. Attorney Del Valle's conduct raises the question whether he indeed has been representing Defendants, or rather using his position as attorney to advance his own personal agenda.

As I see it, attorney Del Valle's gratuitous defamation of attorney Rodriguez is an abuse of his role as an officer of the Court: an attorney should not include in a brief material harmful to the professional reputation of another attorney which is unrelated to the issues in the case. Put another way, malicious gossip by an attorney, in support of what can only be explained as a personal vendetta, ought not to be tolerated in our legal system.

It is equally unacceptable conduct to retry old disputes which have long since been resolved, for the purpose of scoring points off the Special Master. That is precisely what attorney Del Valle has done in a long footnote at page 27 of his mandamus brief in which he resurrects four cases involving disciplinary sanctions, going back ten or

more years. The footnote is mistaken in attributing to the Special Master the power to impose sanctions. His power is limited to recommending sanctions to the Court which does have inherent power to sanction for cause and under Rule 11 of the Code of Civil Procedure. There can be no earthly reason to engage in a detailed analysis of who was right or wrong in these four disciplinary cases. It can, hardly have been of any interest to the judges of the First Circuit to whom his mandamus brief was addressed and who had to resolve whether Defendants' petition for a stay should be granted. There are, however, two comments which should be considered because they throw light on attorney Del Valle's professional misconduct thus far discussed with special emphasis on his possible motives.

First, with respect to his own disciplinary case, which developed in two stages, attorney Del Valle misrepresents his own conduct when he states that the Special Master recommended sanctions as "an attempt to penalize, intimidate and publicly discredit PRODJ attorneys for no other reason than legitimate advocacy on behalf of Commonwealth officials." In the first stage, D-331, the Civil Docket Continuation Sheet reads with the abbreviations spelled out: "Order (HL) – Counsel Valle-Cruz granted until 01-93-15 to either substantiate, under oath, his allegations of unethical conduct, subject to Rule 11 sanctions or disciplinary proceedings and or withdraw his allegations and apologize to court". In the second stage, D-336, January 15, 1993, the Civil Docket Continuation Sheet reads: – "Motion in compliance with Court Order . . . by counsel Valle Cruz".

It is clear that attorney Del Valle in the mandamus brief sought to mislead the Appellate Court that he had been the victim of abusive treatment by the Special Master and

the District Court, when the facts are that to avoid disciplinary sanctions he apologized to the Court for having made unsupported allegations of unethical conduct by the Court. Nor was the Special Master involved at all in the disciplinary matter. It was entirely a matter of the Court responding to a charge of the "possible unethical exercise of judicial functions", by attorney Del Valle, leveled at the Court and which culminated in his "sincere apologies are expressed to the Court." As prior sections of this motion bring out, to strengthen his arguments attorney Del Valle has shown that he is ready to resort to falsehoods and misrepresentations.

Second, there is the question of motive: how to account for attorney Del Valle's professional misconduct, which at times has bordered on the bizarre? In the case of the gratuitous defamation of attorney Rita Rodriguez, it is fair to conclude that the likely motive was that attorney Del Valle held a grudge against the members of the Special Master's Advisory Interdisciplinary Team. What has kept that grudge alive all these years in all probability is his sense of personal grievance. To have made a charge without any basis and then to feel compelled to apologize to the Court to escape punishment must have rankled as an unforgivable humiliation. It is fair to infer from his conduct in this reopening of the case that his grudge against the Advisory Interdisciplinary Team is even stronger against the Court and the Special Master since he almost certainly holds them responsible for his personal humiliation.

In my judgement, there is more than enough in the record to demonstrate that attorney Del Valle is primarily acting out his emotional need to carry on a vendetta with the Court and the Special Master, to the prejudice of his duty

to protect and defend the interests of the Defendants, his clients. It is the only explanation which makes sense to account for some of his bizarre behavior. Consider by way of example his proposal to the Special Master of July 5, 2003 that "you should refrain from further activities on behalf of your investigation pending the decision of the motion for stay before the First Circuit" and to do so "as a matter of courtesy to the appellate judicial system". This proposal was made by attorney Del Valle after the District Court had denied his motion for a stay and had ordered that the investigation continue on its course. In effect, he was urging the Special Master to disobey the instructions of the Court. It is submitted that attorney Del Valle's proposal reflects a troubled legal mind, one which was not functioning in accordance with the dictates of a normal prudent attorney acting to protect the interests of his client. Rather he was using his position as counsel to advance his personal agenda and was not acting on behalf of his clients' interests.

Added to the irresponsible and exaggerated statements by attorney Del Valle considered to this point, are a number of like statements which bring out how his view of reality is clouded by his personal agenda. A few examples suffice to make the point. Perhaps the most significant admission which was made in the June 17, 2003 Status Conference was the statement by the Administrator of ASSMCA that "with respect to Dr. Helfeld's report, what is written there is correct." Attorney Del Valle in his July 13 Reply to Responses of the Plaintiffs and the Master ignores completely the admission of his own client and challenges the conclusion of the Court that the Defendants failed to make any objection to the findings and recommendations of the Special Master's report. He argues that the "factual

averments of the report were shown, in our view, not to be substantiated", thus contradicting the admission of ASSMCA's Administrator and, as well, the report of the Hospital's Medical Director which confirms many of the findings in the Special Master's First Report. The evident purpose of the contradiction is to require an evidentiary hearing which in turn would prevent expedited attention to the deficiencies highlighted in the Special Master's report and would enhance the difficulty in meeting the proposed target date of December 31, 2003 for bringing the Hospital and the San Patricio Center into full compliance.

In the same Reply, attorney Del Valle has this to say in criticism of the Special Master's Response, at note 2:

> His response attempts to both recreate and argue the testimony and evidence and even submits the notes of an assistant, arguable as a record of the conference. Dr. Helfeld thus pretends to serve as surrogate for Judge Laffitte, Special Master, party in the action, counsel for Rullan, and reporter for the court, all in one pleading. It is precisely this confluence of self-ascribed rolls and functions that due process principles seek to keep distinct.

His critique is both exaggerated and an absurd distortion of my response to his motion requesting transcripts and that ASSMCA's fiscal statement be included in the record. It is also irresponsible because there is not the slightest effort to respond to my point by point criticism of his motion.

Consider as a final example the following statement in the Mandamus Brief, at page nine: "The Appellants objected to the court reappointment of Dr. Helfeld on the basis of 'rumors' which the Commonwealth defendants disproved

and which did not justify the reopening of the case." To make this statement attorney Del Valle had to give no weight to the following: The Court called the first Status Conference on March 18, 2003 when it learned that the recommended budget for the Hospital was short by over two millions for fiscal 2003-04 and that the San Patricio Center was about to be wiped out of the agency's budget altogether. These are facts not rumors. Defendants did not disprove the most significant reason for appointing a Special Master which was that everyone interviewed, officials as well as employees, all reported to the Special Master that innumerable requisitions were being returned with the explanations that there were no funds and that this same reason was given for not filling vacancies, nor does attorney Del Valle face up to the fact that the Special Master's First Report includes an abundance of documents, supplied by Defendants and their employees, which are the documentary basis for the conclusion that both the Hospital and the San Patricio Center had suffered serious deterioration in the services they offer over a period of fifteen months. His consistent posture has been to ignore or deny his own clients' statements and admissions if they conflicted with his personal position.

D. The Impact of Defendants' Inconsistent Positions

A large part of the confusion caused by Defendants' motions, appeals and mandamus brief is that their legal representative has presented on their behalf inconsistent positions. The confusion is enhanced each time there is a change of position without any indication that a prior inconsistent position has been disregarded. At different

stages of this case, these are the positions taken by Defendants:

1. Defendants on their own initiative submitted to the Court for its review and approval a proposed contract between Behavioral Health Partners (BHP) and ASSMCA which for a price would have authorized the leasing by BHP of a thirty-bed unit of the Hospital. The contract stated that it could only become effective if approved by the Court. Nothing came of the proposal because ASES, the agency in charge of MBHO contracts rescinded all contractual relations with BHP. The significance of the proposal is that Defendants were prepared to delegate to the Court the final say over whether an arrangement with a MBHO could go into effect. If the Court had accepted the delegation, it would then have determined the permissible arrangements between the Hospital and MBHO's.

2. At times Defendants have argued that the Court had no power to appoint a Special Master on the basis of "rumors". On this theory, the investigation and report of the Special Master have been illegal and void from the beginning because they are in violation of due process.

3. A variation on the second position is to the effect that the Court has authority to appoint a Special Master, but for any investigation to be in accord with due process the scope of the investigation has to be clearly defined.

4. A further variation emphasizes the terms of the reference to the Special Master as being excessively discretional and therefor to satisfy due process the terms of reference should be drafted more narrowly and precisely, the ensuing investigation should be circumscribed to the terms of the Court's Order of January 28, 2002 and any reports of the Special Master rendered in violation of

due process should be vacated. This was the position taken by Defendants in the Mandamus Brief.

5. Finally, Defendants contend that no finding in the Special Master's report can be adopted by the Court. except after the holding of an evidentiary hearing held in accordance with due process. Under this position, admissions by defendants of the deteriorated conditions of the Hospital cannot legally be accepted until they have been tested in an evidentiary hearing.

While confusion may have been caused by the different positions assumed by Defendants, attorney Del Valle's objectives have been clear. His objectives were to invalidate the findings of the Special Master's First Report and the role being played by the Joint Task Force toward resolution of the deficiencies of the Hospital and of the San Patricio Center. Had Defendants' appeals prevailed, the almost certain result would have been to turn this case into a thoroughly litigious contest with no foreseeable date of closure. It is precisely that outcome which attorney Del Valle continues to be intent on pursuing, as demonstrated in Section III which follows.

III. PROFESSIONAL MISCONDUCT SINCE OCTOBER 28, 2003

The July 15, 2003 Judgement of the First Circuit Court of Appeals, dismissing Defendants' appeal for want of jurisdiction, was certified and issued September 15, 2003. Thereafter until attorney Del Valle participated in the October 28 meeting with the Secretary of Health and his staff, he filed no pleadings with the Court. This does not mean that he was uninformed about developments, especially about the meetings of the Joint Task Force and the

documents which were distributed in those meetings. On more than one occasion I raised the question with the Secretary concerning the importance of keeping attorney Del Valle informed of what was being discussed in the meetings of the Joint Task Force, and of primary importance, the executive decisions taken by the Secretary to bring the Hospital into compliance, and as well, the measures being taken to assure that the Hospital could rely on an adequate pre and post support system of services. The Secretary assured me on a number of occasions that he was keeping attorney Del Valle informed which I accept as true. Therefor his continuing allegations that he was kept in ignorance of how the Special Master was implementing the Court's Orders is simply untrue. He does know the positions the Special Master has assumed in the meetings of the Joint Task Force, as well as the contributions to the discussions made by Dr. Torregrosa. He knows what documents and studies were prepared by them and shared with the Secretary and other members of the Task Force. At all times the Joint Task Force was kept advised of the activities of the Special Master and of his associate Dr. Torregrosa.

In the case of the visits to different facilities of the mental health system, these were announced in advance, and the visits and interviews with ASSMCA officials were also made known to Ms. Graulau. Attorney Del Valle's assertions that he has been kept totally in the dark is simply not credible. It is a pretense he makes of ignorance, fabricated to support his claim of denial of due process. Even assuming that his own clients kept him in ignorance, he need only have cited them to periodic meetings for the purpose of keeping him informed. His pretense of

ignorance amounts to professional misconduct and demonstrates once again attorney Del Valle's propensity to try to strengthen his legal arguments by making assertions which are not true to the facts.

Why his participation in the October 28 meeting with the Secretary and his staff, and his failure to give them proper legal advice, constitute professional misconduct, is fully spelled out in Section I of this motion. If his misconduct had produced the results he intended, it would have substantially interfered with the Special Master's unhindered and expedited access to information which he needed to carry out the Court's investigative assignment. His intent misfired because the Secretary rescinded the new controls over access and requests for documents and reports because they were contrary to the terms of reference to the Special Master.

Turning now to an analysis of attorney Del Valle's latest expression, his November 3 "MOTION SUBMITTING OBJECTIONS TO SECOND REPORT OF THE SPECIAL MASTER", one finds a repetition of the same pattern of professional misconduct and distortion of reality to support his legal argument. A limited number of examples should suffice to illustrate the point.

1. At page 10 of the "Objections", attorney Del Valle speaks of the "Master's latest attempt to compose a joint Master Group – DOH Task Force to jointly oversee Hospital operations". That is a completely false characterization. As spelled out earlier in this motion, oversight of the Hospital is entirely in the hands of the Secretary. The Joint Task Force discusses and recommends; it is an advisory body: only the Secretary decides and executes.

2. At page 2, there is this statement: "Except where counsel was expressly notified, we have no way to verify how the evidence accompanying the same was solicited, whether it represents the presentation of individuals or the official position of the Commonwealth defendants, whether the Secretary is aware of the same, whether deliberative and other privileges were sacrificed." These statements are essentially straw men which have no relation to reality, as was demonstrated earlier in this Section. To repeat, the Secretary was notified and made aware of all key documents relied on in the Special Master's Second Report and, almost certainly, he kept attorney Del Valle informed. An even more significant point: attorney Del Valle studiously has avoided giving credence to certain highly probative documents prepared by key defendant officials who respond directly to Dr. Rullan in his capacity as Secretary of Health or as Interim Administrator of ASSMCA. An example is Appendix "H", a study of the expenses of the Hospital which must be incurred to secure compliance and which finds that the present budget is two million short of what will be needed. In fact, he doesn't even mention the document, though it was produced by his own clients and involves one of the central issues to be settled for this case to be resolved: how much is needed in its budget for the Hospital to achieve compliance with the Court's Orders?

3. After citing the $21, 429 millions and the $3.960 millions, the official budgets for this fiscal year for the Hospital and the San Patricio Mental Health Center, respectively, at page 3 of the Objections there is the statement: "These exceed the $18.9 million budget required by this Court's Order for the Psychiatric Hospital" and goes on to complain that the "Master, however, has

unilaterally expanded his commission beyond verifying compliance with the present budgets to reviewing the adequacy of these budgets and the pre and post hospitalization services provided by ASSMCA." The key words which make the latter complaint unfounded are "commission" and "unilateral". First, what convinced the Court to commission an investigation was the fact that the [sic] every informant, from ASSMCA's Administrator to higher and mid-level officials, uniformly stated that many requisitions from the Hospital were being returned with the explanation that no funds were available and the same reason was being given for not filling critical vacancies in professional staffing. The initial premise was that all of the 18.9 millions was not being made available for the expenses of the Hospital.

In the second stage of the investigation, budgetary and financial reports by officials of ASSMCA and the Department of Health, submitted to me and to the Secretary, demonstrated that the problem was not one of access to the Court's Ordered budget of 18.9 millions, but rather one of the insufficiency of that budget to cover the expenses of the Hospital. That being the case, I proposed to the Secretary, and he agreed, that a study of its projected expenses should be prepared, to determine the amount which would be needed for the Hospital to come into compliance. The study was undertaken by a financial officer of ASSMCA in collaboration with the Hospital's Executive Director and demonstrated a shortfall of two millions in the presently approved budget. It provided the answer to the questions which the Court commissioned the Special Master to answer: why were there insufficient funds and what accounted for the deterioration in the Hospital's services? Once Defendants' own officials demonstrated that 18.9

millions was an inadequate budget, that figure became irrelevant to the commissioned inquiry, because one of the principal objectives of the Court is to determine what the budget for the Hospital should be for it come into compliance.

Second, the alleged unilateral change in the terms of the Court's commission does not square with the facts, as attorney Del Valle knows, or should know. Thus, the Court's January 28. 2002 Order states unequivocally: the Court finds "that pre-and post-Hospital support systems are essential to keep and maintain the Rio Piedras Psychiatric Hospital de-institutionalized and constitutionally healthy." The systemic approach to securing compliance is also the position the Secretary has adopted, and with good reason. He knows, and attorney Del Valle should know, that the Hospital is retaining a large number of MBH (Maximum Benefit of Hospitalization) patients because the "Hogares" program has no spaces to receive them. Only a balanced and adequately funded mental health system can assure continued compliance and thus permit the Court to end the mastership. The systemic approach to securing compliance was not unilaterally taken by the Special Master, but rather was the recommendation by consensus of the Joint Task Force and was adopted by the Secretary as the policy to be followed The ultimate justification for that policy is that it is the only approach which has a good chance of achieving a permanent state of compliance by the Hospital. Attorney Del Valle rejects that conclusion which puts him at odds with the Secretary of Health, a principal defendant in this case. He does not seem to be aware of the dilemma of professional ethics in which he is involved and of whether he should continue to represent the Secretary of Health.

3. On the question of legal precedent in support of his due process objection, attorney Del Valle states at page 5: "Legal precedent with respect to the issue presented is scarce, as the issue is judicially novel." But the word "scarce" is not correct. The correct characterization is not scarce, but rather should read "non-existent". The fact of the matter is that he could not, nor could I, find a single case which supports his legal argument. In Section II, the legal reasons for concluding that his due process claim is without merit are fully spelled out. In final analysis the only possible chance that attorney Del Valle has of having his due process claim vindicated, is if he is able to prove that the Special Master has in fact carried out the Court-Ordered investigation with all of the abuses which he has alleged. Ordinarily, fairness would require that attorney Del Valle have his day in court, followed by a judicial determination of whether the Special Master's investigative practices have in fact been abusive to defendants. But this is no ordinary case. The dilemma faced by the Court is whether the pattern of professional misconduct which characterizes attorney Del Valle actions is so egregious that he should be removed as counsel for Defendants or, notwithstanding his professional misconduct, he should be permitted to continue as counsel for Defendants with the imposition of such sanctions as the Court deems appropriate.

4. At page two of the Objections, attorney Del Valle makes clear that he is very confidant of the rightness of his cause. First, he informs the Court, referring to the Secretary of Justice, that the "Secretary has determined to present a writ of certiorari with respect to Appeals Nos. 03-1884 and 1946." Second, he states that the First Circuit "has retained jurisdiction over the latter appeal, which

concerns the participation of the Master in executive functions of the Hospital." As in the claimed violation of due process, whether there is merit to the allegation that the Special Master has engaged in executive functions of the Hospital has been fully refuted in this motion. Nonetheless, if attorney Del Valle is deemed fit by the Court to continue representing the defendants, he should have the opportunity to prove his allegations. However the Court may decide, attorney Del Valle's message is clear: he intends to litigate his claims fully through the entire judicial system. Following that course of action would mean, inescapably, that the possibility of an expedited resolution of this case will have ceased to exist.

CONCLUSION

Given the pattern of his unprofessional conduct practiced thus far and the great probability this same unprofessional conduct will continue, it would be in the interest of the plaintiff mental patients, the Government defendants and, as well, the affected Puerto Rican mental health community as a whole, for the Court to take such remedial action as may be necessary to ensure that attorney Del Valle litigious tactics not be permitted to continue to the detriment of the expeditious resolution of this case. Remedial action is also called for by the way attorney Del Valle's misconduct has abused the confidence and time of the District and Appellate Courts. There follows a number of remedial measures which the Court is urged to consider.

1. For the pattern of professional misconduct which attorney Del Valle has practiced. monetary sanctions would be entirely fair and just. The catalogue is impressively damning: a regular pattern of resort to reckless

disregard for truth to support legal arguments which would otherwise be unpersuasive, the sowing of conceptual confusion to divert and delay attention from the substantive merits of the case, instances of defamation, of burdening the record with disputes long since resolved, irresponsible and exaggerated assertions, the uncertainty caused by Defendants' adoption of inconsistent positions and an apparent complete indifference to the serious deterioration in mental health services. On this record of misconduct by attorney Del Valle Rule 11, without doubt, calls for monetary sanctions.

2. There is more than sufficient evidence in the record for the Court to consider remedial action that goes beyond monetary sanctions. That is because there is a real doubt whether monetary sanctions alone would prove to be an effective remedy in terms of preventing a reoccurrence of attorney Del Valle's misconduct. He of course does not consider any of his practices or any of the litigation that he has fomented thus far, as misconduct, but rather as precisely how an attorney should act in an institutional case. It is evident that he is convinced that the way to deal with institutional cases is by throwing up every conceivable legal obstacle to the flow of information needed by the Special Master's investigation to inform the Court of the state of compliance with court orders, and most important of all, to insist on procedures under which Defendants' counsel would have the maximum capacity to control and render ineffective information-gathering measures taken by the Special Master to implement the Court's Orders and, as complementary objective, to seek to limit the Special Master's jurisdiction to the minimum possible scope. It should be stressed that his strategy of interposing obstacles to the effective performance of the Special

Master's responsibilities, taken alone, would not call for an extraordinary, remedy. That is because it could be dealt with by the Court's firmness in managing the case.

What makes this case exceptional, not easily remedied by monetary sanctions or firm judicial management, is the deep seated personal animus which the record demonstrates attorney Del Valle bears toward the Court, the Special Master and a former member of his interdisciplinary team. It is the essential key to understanding his consistent misconduct. It accounts for the fact that monetary sanctions will almost certainly not change his animus, but may very well intensify those same feelings. In this context it is important not to forget the interests of the Defendants. There is nothing in the record to support the idea that monetary sanctions might induce him to represent Defendants' interests as the Secretary sees those interests. In truth, attorney Del Valle basically has not been representing the interests of those Defendants who are responsible for providing mental health services. Nor has he shown any interest in resolving the constitutional rights of mental health patients.

Rather, he has used his position as counsel for Defendants to advance his own personal agenda and to act out his personal animus. This has resulted in a manifest conflict in approach between him and his principal client, the Secretary of Health. His basic objective is to win a legal victory, based on alleged violations of due process and alleged abuse of investigative power by the Special Master, while the Secretary focuses on recognizing and solving mental health problems, complying with the Court's Orders and, finally, securing a decision by the Court to end this case. To cite one concrete, highly significant example, the problem of the large numbers of Maximum Benefits of

Hospitalization patients in the Hospital and the consequent constitutional violations under the *Olmstead* doctrine: attorney Del Valle avoids the problem by not mentioning it, while the Secretary seeks funding for the program of Hogares so that there will be adequate spaces for discharged Hospital patients in need of post hospitalization housing and rehabilitation.

On this record, the ultimate question is, what should the remedy be? The explanations in this motion for attorney Del Valle's professional misconduct counsel that a preventive remedy would be appropriate to insure against the likelihood of future repetition. This could be accomplished in at least two ways: to order that attorney Del Valle be removed from his position as attorney representing the Defendants, requiring Defendants to replace him, or by a disbarment proceeding based on the number and character of his acts of professional misconduct. In all candor, I have misgivings about proposing such drastic remedies. And yet, I do not see it as fair to the plaintiff class, to the Defendants themselves, to the Court and to this Special Master, to allow attorney Del Valle to continue burdening the process for resolving this case with the professional misconduct which has characterized his manner of representing the Defendants. I assume that attorney Del Valle will respond to this motion and will have the opportunity to be heard. I also assume Plaintiffs' counsel will exercise his right to comment. Thereafter it will be for the Court to determine whether attorney Del Valle should be permitted to remain as counsel to the Defendants and, if so, on what terms.

> **THEREFOR**, the Court is respectfully requested to impose sanctions against attorney Del Valle: for his failure to advise his clients against taking

> the illegal course of action which was adopted on October 28, 2003, and in which he participated, and for the multiple acts of professional misconduct in which he has engaged, almost from the beginning of this case to the present.

In San Juan, Puerto Rico, this November 14, 2003.

Respectfully submitted,

/s/ David M. Helfeld
David M. Helfeld
Special Master

It is herewith certified that copies have been sent by FAX to:

Hon. Anabelle Rodriguez, Secretary of Justice, Commonwealth of Puerto Rico
Carlos Del Valle Cruz, Esq.
Carlos V. Garcia Gutierrez, Esq.
Hon. Johnny Rullan, Secretary of Health, Commonwealth of Puerto Rico

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

ROBERTO NAVARRO AYALA, et al.,	*	
Plaintiff,	*	**Civil No. 74-1301(HL)**
v.	*	
GOVERNOR OF PUERTO RICO et al.	*	
Defendants.	*	

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OPPOSITION TO SPECIAL MASTER'S
REQUEST FOR SANCTIONS

TO THE HONORABLE COURT:

Comes now the Commonwealth defendants, through their counsel of record, and respectfully state and pray:

On September 14, 2003, the Special Master in this case, Dr. David Helfeld, filed with the Court a Motion Requesting the Court to Sanction Defendants' Counsel, Attorney Carlos Del Valle Cruz, for Professional Misconduct (the Motion), in which he "finds" that the Department of Justice counsel for defendants is engaging in "obstructionist conduct to the detriment of the Special Master's court-assigned investigation." As with the charges in the First Report, this Motion is but another attempt to silence the Department of Justice of the Commonwealth of Puerto Rico from raising the constitutional challenges to an ex-parte, off-the-record investigatory proceeding which potential for abuse has now become evidenced and actualized by this untempered and unwarranted request to have

counsel fined, removed and disbarred for constitutional questioning the Master's conduct.

Because the charges of unprofessional conduct are hollow and the attempt to deprive the Commonwealth defendants' of legal representation is repetitive of the same type of abuse of discretion for which the Court of Appeals revoked the Special Master for imposing sanctions in *Navarro-Ayala v. Hernández-Colón,* 3 F.3d 464 (1st Cir.1993) (Navarro III), respectfully requested from this Honorable Court that the Motion be denied and that the Court takes the necessary measures to guarantee that the due process rights of the Commonwealth defendants not be unduly trodden down by the present procedures. We proceed to develop these arguments.

The principal flaw with the Special Master's request is the incapacity to understand the legitimacy of the Commonwealth's defendants argument: that the Court appointed power to a special master to engage in an ex-parte investigation of persons and documents, is a constitutional due process violation that threatens the very core of a representative and Constitutional democracy. This Court has appointed a Special Master with the roving power to ex-parte interrogate public officials and employees, request documents, require the preparation of reports, participate in deliberative process and make findings without any type of notification to counsel, hearing, formal record-keeping, legal restriction, or constitutional due process safeguard of any kind. By allowing the Special Master to operate without constitutional oversight, there is by delegation a circumvention of the Constitutional restrictions that apply to Article III judges. The Constitution does not grant even a federal judge these awesome powers for the fundamental reason that they could be used

unscrupulously to intimidate, coerce and undermine representative government in a manner that betrays the essence of the sacred principle of due process under law.

The Commonwealth Department of Justice has challenged the grave potential for abuse that the unchecked investigatory and fact-finding powers threaten. The Motion for Sanctions filed by the Special Master is the best example of the pitfalls that due process safeguards are meant to prevent. Because the Master is empowered to investigate ex-parte and without notification or participation of counsel, there is no formal record of any of the proceedings of his investigation of the Psychiatric Hospital. In the absence of a record, the Master relies in his Motion on what he calls "informants." Motion p. 2.

Deeply disturbing is the Special Master's admission that he has used these "informants" to infiltrate the meetings convened by the Commonwealth defendants with counsel to deliberate the responses to this Second Report and in which attorney-client discussions take place. Thus, the Masters states in his Report that in a October 28, 2003 meeting that counsel Del Valle had with his clients, a new policy was adopted to forestall cooperation with the Master. According to the Motion, "The new policy apparently was adopted orally and precisely how it was phrased is less than clear **because my informants** did not describe it in identical terms." (2).

By relying on secret informants, instead of findings on the records, the Special Master has committed the constitutional breach that motivated the Commonwealth Department of Justice to challenge his unrestricted ex-parte powers originally. These "informants" have been consciously and deliberately used by the Special Master to

breach two of the more cherished privileges in the constellation of values that characterized due process and liberty under our constitutional system: the attorney-client relationship and the deliberative process of the governmental officials. For it is clear, from his own admissions, that the Special Master has used these secret "informants" to engage in discovery of the governmental deliberations and attributed attorney advise with respect to the meeting of October 28, 2003, convened by the Commonwealth defendants to examine and respond to the Second Report of October 15, 2003.

The charges of obstruction in the Motion are based on what allegedly these "informants" have told they [sic] Special Master, but as in non-democratic societies, there is no disclosure of the secret identity of these "informants," of the contents of their disclosure, or a record that will allow the affected parties of the opportunity to contest, if necessary, the "informants" off-the-record revelations. The use of "informants" as a means to infiltrate the government policy deliberations and the attorney-client relationship in the inner sanctum of the Secretary's private office is a misconduct by the Special Master of such a grave and severe nature that the Commonwealth is forced to request that this Court examine the continued appropriateness of his appointment. The Commonwealth, furthermore, reserves the right to take all relevant legal measures to prevent recurrence of this invasion of governmental rights by the use of "informants" in the Secretary's most private and deliberative meetings.

Whether a new policy was instituted, the record does not show, but the Motion recognizes that the Secretary of Health was concerned by the inclusion in the Second Report of a financial report which the Secretary had not

had occasioned to examine and review prior to its submission to the Master, and which did not necessarily represent the official position of the Secretary. This is the showpiece of the Second Report on which the Master's bases his conclusion that the Psychiatric Hospital is operating with a $2 million shortfall. The Secretary was simply asserting the right to review such fundamental documents if they are going to be portrayed by the Master as the official position of the Department of Health.

Dr. Helfeld further claim that he had "the practice of requiring all persons interviews and of whom documents were required to be submitted to inform the Secretary and the Joint Task Force." According to the Motion, "These practices of requiring that the Secretary be informed of all factual interviews and information requests. "These practices wee [sic] implemented, according to the Master, "because I was convinced, and remain convinced, that transparency is the right course to follow and services to encourage defendant's expedited compliance with the Court's Orders."

This claim of transparency by the Special Master is not borne out by the record. The Commonwealth defendants are not regularly notified of all the interviews of other officials and employees conducted by the Special Master. If records or notes are kept of thee same, they are not shared with the Commonwealth defendants. Most of the documentary requests are verbal, and those that are in written form are not copied to the Commonwealth defendants. We have seen no memo or directive by the Special Master requiring all officials and employees in the fact-finding process to inform the Secretary. And needless to say, the Department of Justice is kept in the dark as to

Special Master's investigation. If the claim of transparency is correct, we ask of the Special Master, if he be so kind, to share with the Court copy of these directives in which his claim to a practice based on "transparency" is grounded.

In his Motion, the Special Master claims that Rule 11 sanctions are appropriate because the Department of Justice's challenge to the foregoing ex-parte powers is meritless. There is little merit to this position. The Monitor claims that the constitutional challenge to his investigatory powers were dismissed by the Court of Appeals, but fails to mention that the Court of Appeals merely dismissed the appeal and mandamus for lack of jurisdiction and has not indicated any opinion on the merits of the challenge. Second, while the Department of Justice has presented extensive briefs on the grounds for its constitutional challenge, the extensive Motion by the Special Master cites no relevant legal authority contrary to the position argued by the Commonwealth Department of Justice in its brief to this Court and the Court of Appeals. *Navarro-Ayala v. Hernández-Colón,* 956 F.2d 348 (1st Cir.1992) (Navarro II), cited by the Master, is simply inapposite since the First Circuit did not address the due process challenges raised by the Commonwealth in the present proceeding. In the absence of an adverse decision on the merits by the reviewing courts, and the dearth of any decision contrary to the Commonwealth's constitutional challenge, it is frivolous to claim that the Commonwealth's argument substantively breach Rule 11.

The Motion goes on to state that "the record will further demonstrate that attorney Del Valle's pattern of misconduct has been so egregious" that disbarment is called for. This averment, to the contrary, is grist for the

mill of the Commonwealth constitutional challenge: other that the legal pleadings on which the argument may be based, there is no record of any such conduct. The request for a transcript of the March 17 and June 17, 2003 concerning the justification for the appointment of the Special Master and the adoption of the First Report is not, as portrayed by the Special Master, an act of bad faith, but a demonstration of a fact: that the Court and the Special Master have to this date conducted all proceedings without record-keeping. The approval of the First Report without hearing is a due process breach. The request for a transcript is undisputed evidence of its absence, not deceit; it takes that issue out, for appellate purpose, from the realm of lawyerly averment into the territory of undisputed fact.

Also spurious is the claim that the PRDOJ counsel misrepresented the facts concerning the argument of co-administration on which its federalist claim was based. The factual basis for said argument were included in the documentary appendix to the First Circuit and consist of a letter Dr. Helfeld sent to Dr. Rullán.[1] The Motion claims

[1] The First Circuit brief based its argument on the documentary record submitted. It reads: Similarly, Dr. Helfeld has followed this investigatory approach in ex-parte meetings with other Commonwealth defendants with interrogatories concerning governmental deliberative processes; specifically Dr. Helfeld has pried into the Commonwealth's deliberative processes concerning decision-making and public policy in the realm of mental health. Evidence of this intrusion is the last letter sent by Dr. Helfeld to Secretary of Health indicating the creation of the Master's Group that is to meet with the Secretary's Task Force designated named to address the Hospital's reform. Ap. 166. This Master's Group seems geared to the participation in the co-administration of the Hospital and exceeds by far investigatory

(Continued on following page)

that counsel did not make reasonable inquiries, but this is not correct. Neither the plaintiffs nor the Master disputed the factual evidence buttressing the appeal to the Court of Appeals and it seems rather late in the day to resurrect this as an issue in a forum in which it was not raised. In any event, given again the absence of any record of the Task Force proceedings, the contents of the Special Master's own admissions in his Report and letters, and the data supplied by officials and employees, there are no legitimate grounds to this indictment.

The due process challenges that the Commonwealth has raise to the Master's ex-parte investigation have come home to haunt the investigation of the Special Master. This is so because the absence of a findings on the record do not allow verification of the averments in the Reports and the Motion. The master, therefore, must rely on mere arguments based on hearsay evidence facts askew of the legal or factual reality of the underlying proceedings. The

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functions with respect to compliance with the stipulation. In his letter to Secretary of Health, the Special Master exclaims:

> Finally there is an issue which should be faced: how much of mental services should be provided by MBHO's and how much by public institutions? In short, how best to implement public policy, both federal and Puerto Rican, in the field of mental health?

Clearly the transmutation of the fact-finding commission into the transcendental mission of reviewing state federal and state public policy in the mental health arena is unwarranted by even the most charitable reading of the judgment terminating the case, which focuses on the Hospital's budget. This self-assumed Promethean endeavor goes beyond examining compliance with the final judgment and inserts the Special Master in the critique and/or formulation of the Commonwealth public policy, through ex-parte proceedings absconded from legal optics, and without any type of constitutional due process safeguards.

absence of a fact-finding on the record is further compounded by the unilateral decision of the Special Master to dispense with the provision of the Order of Reference that requires the Master to submit the Report to their parties for comments and rectifications prior to the filing of the same.

Finally, we note that the Motion goes to great length to attribute to PRDOJ counsel devilish motivation for his constitutional challenges, characterizing the same in different part of the Motion as a personal animosity, personal agenda, personal vendetta, personal grudge and other words of that sort. These characterizations demonstrate not only impairments in mind reading proficiency; recourse to this type of ad hominem argument demonstrates a judicial temperament incapable of understanding the seriousness of the constitutional infirmities that the Special Master's unrestricted, ex-parte and of-the-record investigations present to due process rights and federalist relations under the Constitution.[2] There is no intent here

[2] To take a couple of examples. The Special Master claims that counsel bears a "personal grudge" against the members of the Task Force, particularly with respect to counsel Rita Rodriguez Falciani. This is not correct, for up to this case, counsel and Rodriguez have worked together in the past, as far as counsel is concerned with a warm and cooperative relationship. In this case, however, while the Special Master has excluded the present of the Department of Justice from all investigatory interviews he has on occasion allowed the presence of Rodriguez, then counsel for ASSMCA. In his Report, however, the Master failed to mention to the Court that she was his Deputy Monitor for most of his 12-year prior tenure. Under these circumstances, she clearly not only had a potential conflict of interest for – to pardon the expression – she cannot serve two masters simultaneously. This situation supported the statement in the appellate brief: "She is conceivably, metaphorically speaking, a veritable Trojan horse." The

(Continued on following page)

to invalidate a Master Report for the sake of invalidation or for the sake of impending an investigation that may end up being to the benefit of the Hospital. The only motivation is the consciousness of what the Master's ex-parte investigation represents in term of an ominous precedent for a democratic society; and the attempt to reconcile a legitimate judicial objective with a constitutionally sound procedure. The Special Master seeks to achieve his objective regardless of the cost to the constitutional due process rights of government defendants in general. This balance of values, it seems obvious, is constitutionally unacceptable.

Equally disturbing is the lack of judicial temperament that the request for sanction, including the disbarment of counsel, demonstrates. This is the same type of recourse to sanctions against the Department of Justice attorneys that dare question the Master conduct seen in the past. As this Court is aware, in *Navarro-Ayala v. Hernández-Colón*, 3 F.3d 464 (1st Cir.1993) (Navarro III), the Court of Appeals reversed sanctions recommended by Dr. Helfeld and adopted by this Court to sanction attorneys for the Commonwealth for any perceived questioning of his authority.

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fact that the Special Master in presently relying on "informants" to discover the contents of the Commonwealth defendants' deliberative process and attorney-client communications certainly shows that the prophecy of the possibility of Trojan Horses in the Master's employ was Delphic. In another trivial example, the Master claim that the PRDOJ exhibits inconsistent positions because in the first interview with Dra. Aguilú, counsel requested assistant Linda Navedo to be present to take notes, instead of being present himself. The Master selectively omits mentioning the reason for counsel's unavailability. At the time he learned of the interview, he was at the other end of the island, at the Hostos School of Law in Mayaguez, giving a class.

There, in a case briefed and argued by the undersigned, the appellate court reversed Fed.R.Civ.P. 11 sanctions imposed by Dr. Helfeld on PRDOJ attorney Kenneth Colón for questioning the compensation of the Special Master. This Motion for Sanctions represent a lesson not learned; another attempt to penalize, intimidate and publicly discredit PRDOJ attorneys for the raising of a constitutional challenge that goes to the heart of the defendants due process rights in the context of an investigation under Fed.R.Civ.P. 53. As in Navarro III, legitimate advocacy, under the guise of professional misconduct, is sought to be penalized.

The possibility that this awesome power to engage in any investigation outside the margin of the law may be used abusively, arbitrarily and repressively is evident in this Motion for Sanctions. The absence of any due process safeguards already presents the specter of a roving judicial officer with unlimited investigatory powers and without constitutional constraints that invades the constitutional rights, privileges and prerogatives of the Commonwealth defendants and their attorneys. Now to these powers, the Special Masters wants disbarment of the Department of Justice attorney for challenging the same. This conduct by a Master under Rule 53 is a dangerous precedent for a democratic society of cardinal national importance. On the authority of *Navarro III*, we respectfully request that this Honorable Court reject the recommendations of the Special Master in his Motion and further invite the Court to reconcile the powers granted to the Special Master with the requirements of due process under the Constitution. This reconciliation will promote, rather than retard, the shared objectives of this action.

Wherefore, it is respectfully requested that the Court take note of the foregoing response and take any action it deems appropriate.

Respectfully submitted.

In San Juan, Puerto Rico, this November 17, 2003.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this same date, a true and exact copy of the foregoing is being served on:

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No. 03-933

Supreme Court, U.S.
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In The

Supreme Court of the United States

HON. SILA M. CALDERON, Governor
of the Commonwealth of Puerto Rico, et al.,

Petitioners,

v.

ROBERTO NAVARRO AYALA, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the First Circuit is obligated to exercise its jurisdiction under the collateral order doctrine or its mandamus review power where a defendant complains that a Special Master's investigation includes "ex parte" (outside the presence of counsel) communications with defendants.

Whether a Special Master designated by a district court may communicate with defendants on an "ex parte" (outside the presence of counsel) basis as part of his investigatory efforts where the district court will not act upon the Special Master's investigation prior to granting the parties an opportunity to be heard and present evidence.

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STATEMENT OF THE CASE

A. Nature of the Case and Procedural Background:

This case originally began in 1974, when Roberto Navarro Ayala, a patient at the Psychiatric Hospital of the Commonwealth of Puerto Rico filed a complaint under 42 U.S.C. §1983 before the United States District Court for the District of Puerto Rico on behalf of himself and all others at the Rio Piedras Psychiatric Hospital (hereinafter the "Hospital"), asserting that the inhumane conditions there violated Plaintiffs' constitutional rights. Included as defendants were the Governor of the Commonwealth of Puerto Rico, the Secretary of Health for the Commonwealth of Puerto Rico, and other government officials having control over the Hospital. The history of the case, which has gone on for over twenty-five years, has involved, among others, court approved stipulations relating to conditions and practices at the Hospital, the appointment of a special master to oversee the implementation of the stipulations (from 1985 to 1997), and various appeals. *Navarro-Ayala v. Hernandez Colon*, 3 F.3d 464 (1st Cir. 1993); *Navarro-Ayala v. Nunez*, 968 F.2d 1421 (1st Cir. 1992); *[Navarro] Ayala v. [Hernandez] Colon*, 956 F.2d 348 (1st Cir. 1992); *Navarro-Ayala v. Hernandez-Colon*, 951 F.2d 1325 (1st Cir. 1991). During that time the Hospital instituted reforms designed to improve conditions and eliminate constitutional violations at the Hospital.

By the year 2000, the Hospital had been accredited by the Joint Commission on Accreditation of Healthcare Organizations ("Joint Commission") and had been approved by the Health Care Financing Administration (HCFA), a federal government entity, to become a provider of the Medicare Program. In light of improvements at the Hospital, and with a view towards terminating the litigation

in this case, in August of 2000, the Plaintiffs (Respondents here) and Defendants (Petitioners here)[1] filed a *Joint Stipulation and Order of Dismissal Without Prejudice to Reinstatement on or Before October 15, 2001, on Certain Conditions* (District Court Docket No. 494), which provided for the eventual dismissal of the case. Pursuant to the stipulation, in January 2002, the case was dismissed and closed, subject to the continued effect of certain court orders. (App. at 14-20.) The orders which were to remain in effect required, among others, that monies received by the Hospital from Medicare payments or reimbursements be allocated to the Hospital's operational account (App. at 21-22), and that the Hospital's budget not be reduced (District Court Docket No. 494). No further action was taken by the Court or the parties and the case remained inactive until March of 2003.

B. Events in the District Court Relating to the Order Appealed from in This Case:

On 12 March 2003, the Court entered an order setting a status conference based on information to the effect that the orders left in effect were being violated. (App. at 8-9.) At the status conference Defendants made assurances to the Court and offered to make certain information available regarding the areas of concern. (District Court Docket No. 505.) At the time, the Court expressed its satisfaction with the results of the conference. On 29 April 2003, the Court, acting on new information referred to it by Commonwealth mental health employees, expressed serious

[1] For the sake of clarity, Petitioners are referred to as "Defendants" in the portions of this opposition describing the proceedings below and as Petitioners in the remainder of the opposition.

concern regarding the possibility of non-compliance with Court orders and violations of the constitutional rights of the Plaintiff Class. (App. at 10-13.) According to the information brought to the attention of the district court and later admitted to by the Defendants, in the months preceding the orders now challenged, the Hospital has confronted a financial imbroglio which had already begun to compromise conditions at the Hospital in a manner implicating the constitutional rights of the patients there, the Plaintiff Class.[2] Based on the information received, the district court entered an order reappointing Dr. David Helfeld[3] as Special Master to investigate these matters and report and make recommendations "with all deliberate speed," reinstating, for this purpose, the original order appointing him Special Master in 1985. (App. at 10-14.) The original order of reference provided, among others, that:

> (f) The Master shall have access to all facilities, records, documents and persons affected by or involved in the implementation of this decree for the purpose of gathering information relevant to enforcement of the decree. The Master shall have the authority to conduct inquiries and consult

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[2] The information brought to the district court and admitted to by the Defendants is that requisitions, including those for medications, have been returned for the proffered reason of insufficient funds, patients reside at the hospital beyond the amount of time medically necessary because the hospital is unable to place them elsewhere, the hospital is sorely understaffed with respect to psychiatrists such that one of the Hospital's buildings has been shut down and, as a result, the Hospital had begun to experience periodic overcrowding.

[3] Dr. David Helfeld originally acted as Special Master in this case from 1985 to 1997.

> with professionals to assist in finding facts relevant to implementation.
>
> (g) The Master shall hold meeting as often as he deems necessary, at which any employee, resident, parent, foster parent, next of kin or guardian, or any other person deemed by the Master to have an appropriate interest, may appear and make recommendations, comment, or suggestions as to any matter covered by this decree.
>
> . . .
>
> (i) Informal Suggestions. The Master may make informal suggestions to the defendants, in whatever form he deems appropriate, which in his opinion will facilitate compliance with the decree.

(App. at 24-25.) Pursuant to the district court's 2003 order, the Special Master commenced his investigation holding interviews with Hospital staff and other government health officials and reviewing Hospital documents.

On 5 May 2003, Defendants filed a motion requesting a status conference and objecting to the Special Master's investigation on the basis that it was being conducted ex parte, (meaning outside the presence of counsel) (App. at 125-128.) The concern voiced in that motion was that counsel for Defendants was not being kept abreast of the Special Master's investigatory efforts and was not being allowed to participate in interviews and the furnishing of documents. The Court set a status conference, which was held on 17 June 2003. In the meantime, on 22 May 2003, Defendants filed a "Notice of Appeal from the 29 April 2003 order designating a Special Master," (App. at 144-145), and requested that the order be stayed pending appeal, (District Court Docket No. 511). In addition, on 3

June 2003, the Special Master filed his "Report of Investigation In re Roberto Navarro Ayala, et al. v. Governor of Puerto Rico et al. Civil No. 74-1301 (HL)." (App. at 46-87.)[4] In that report, the Special Master preliminarily concludes that it appears that the Hospital is confronting serious difficulties in offering adequate services to its patients due to a lack of access to its budget. Moreover, the Special Master indicated that he had been unable to complete his investigation because, commencing on 21 May 2003, counsel for Defendants had instructed the Defendants and their agents and employees not to cooperate with the Special Master's investigation, thus obstructing his efforts to gather pertinent information.

On 13 June 2003, the district court entered an order indicating that, contrary to Defendants' position, a Special Master can make ex parte investigations and findings, as long as the parties are afforded an opportunity to challenge them. (App. at 31-32.) After the 17 June 2002 status conference, requested by Defendants, the district court entered an order denying Defendants' petition to stay the Special Master's investigation pending appeal, and stating that it "expects the defendants' full cooperation with the Special Master's investigation." (App. at 33-37.) The Court further indicated that the Special Master's term would expire on 31 December 2003, unless the same was extended by the Court. (*Id.*) The following day, counsel for

[4] Defendants included in their appendix a copy of this report but omitted over eighty pages of exhibits including a mass petition signed by 186 employees bemoaning the deterioration of the Hospital in the past two years.

Defendants filed an "Amended Notice of Appeal to the First Circuit," to include this order. (App. at 152-153.)

On 23 June 2003, the district court issued its Minutes of the 17 June 2003 status conference summarizing what had transpired during that meeting. (District Court Docket No. 523.) On 23 June 2002, counsel for Defendants filed a bewildering motion requesting transcripts of the status conferences of 18 March 2003 and 17 March 2003. (App. at 154-157.) Neither of these status conferences had been held in the courtroom, nor was any court reporter present; nor did Defendants ever request that the status conferences be held on the record and transcribed. The Plaintiff Class and the Special Master responded to this motion. (District Court Docket Nos. 527 and 529.)[5] On 25 June 2003, counsel for Defendants filed a "Second Amended Notice of Appeal to the First Circuit," to include the Minutes of the Status Conference insofar as the district court had authorized "generalized ex parte proceedings by the Court and/or the Special Master." (App. at 158-159.) The district court issued an order on 15 July 2003, clarifying its Minutes of the 17 June 2003 status conference and denying Defendants request for transcripts. (App. at 40-43.) The district court's order further provided that, "[o]nce the special master concludes his investigation and files a complete report, the Court will afford the parties the opportunity to file objections to the Special Master's report and hold an evidentiary hearing if warranted." (*Id.* at 43.)

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[5] These documents were not included in the Appendix to the Petition for Certiorari, although Defendants' response to them was. (App. at 160-166.)

On 17 October 2003, the Special Master filed his "Second Report." (App. at 88-124.)[6] On 3 November 2003, Defendants filed a "Motion Submitting Objections to Second Report of the Special Master." (App. at 167-179.) With respect to the contents of the report, Defendants objected that the budget for the Hospital and the San Patricio Center was within the court established requirements. The emphasis of the motion, however, was on the argument that counsel for Defendants was not being kept abreast of the Special Master's investigatory efforts and was not being allowed to participate in interviews and the furnishing of documents, thus, Defendants argued, rendering the Special Master's investigation unconstitutional on due process grounds. Moreover, it was alleged, the Special Master was "participat[ing] in executive functions" and attempting to "co-administer the Hospital" by creating a Master Group to meet with the Department of Health Task Force which was overseeing the Hospital.[7] Soon

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[6] Again, the Appendix to the Petition of Certiorari includes a copy of this report but omits approximately three hundred pages of exhibits submitted with the report.

[7] Petitioners "note," (*see* Pet. for Cert. at 15 and 22), but do not present for review, (*see* Pet. for Cert. at i), their claim that the Special Master has exceeded his mandate by creating a "Special Master's Group" to meet with Department of Health officials in order to assist them in addressing problems currently faced by the Hospital. This *proposal* was initially made by the Special Master and ultimately countenanced by the Secretary of Health, one of the Petitioners in the case. It should be noted that the order of reference in this case specifically authorizes the Special Master to, "make informal suggestions to the defendants in whatever form he deems appropriate, which in his opinion will facilitate compliance with the decree." Counsel for Petitioners makes exaggerated claims to the effect that Petitioners were coerced into this arrangement and that the meetings constitute "undu[e] influence" of and "participat[ion]" in the administration of the Hospital and "Commonwealth public

(Continued on following page)

thereafter, the Special Master filed a Motion for sanctions against counsel for the Defendants arguing that he should be punished for his tenacious obstruction of the Special Master's investigation and for making inflammatory accusations against the Special Master. (App. 180-221.) This motion was denied by the district court on 9 December 2003. (App. at 44-45.)

The Special Master's Third Report was filed on 20 January 2004. (District Court Docket No. 546.) On 30 January 2004, the district court extended the term of the Special Master to 1 May 2004.

C. Proceedings before the First Circuit Court of Appeals:

On 1 July 2003, pursuant to Defendants' Notices of Appeal[8] of 22 May 2003, 18 June 2003 and 25 June 2003,

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policy." Conspicuously lacking, with respect to this claim, are any specific examples of such undue influence or evidence of any conflict arising from suggestions or proposals made by the Special Master or the "Special Master's Group." The question of the propriety of these meetings is, conveniently, not presented for review, but rather casually dropped into Petitioners' argument in an effort to cast a dark cloud over the Special Master's enterprise. Thus, these ill-willed accusations should be totally ignored by this Court.

[8] Defendants' practice of filing several purported amendments to the notices of appeal created some disorder in the docketing functions of the First Circuit Court of Appeals. The notice of appeal of 22 May 2003, was docketed as Appeal No. 03-1884. Defendants 19 June 2003 "Amended Notice of Appeal," was docketed in the circuit court as Appeal No. 03-1998. The 25 June 2003 "Second Notice of Appeal," was docketed as part of Appeal No. 03-1998. Defendants' Petition for Writ of Mandamus was further docketed as No. 03-1946. Appeal No. 03-1884 was consolidated with the mandamus petition No. 03-1946, but, consolidation was not

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Defendants filed a "Motion for Stay of the District Court Orders Authorizing Ex-Parte Investigation by Special Master and Requesting Expedited Appeal," before the Circuit Court of Appeals for the First Circuit. On 2 July 2003, the Circuit Court of Appeals issued an order noting their apparent lack of jurisdiction over the orders appealed from and directing the Defendants to voluntarily dismiss the appeal or to show cause why the appeal should not be dismissed for lack of jurisdiction. On 8 July 2003, Defendants responded by referring the court of appeals to its "Petition for Writ of Mandamus and Appellant's Brief on the Merits," which had been filed on 3 July 2003[9] arguing that jurisdiction was predicated on the Court's supervisory mandamus power and pursuant to collateral order exception under *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). Defendants also filed an "Emergency Motion for Stay of Special Master's Co-Administration of Psychiatric Hospital Pe[n]ding Review of Motion for Stay," a motion which was denied by the circuit court on the same day it was filed.

On 15 July 2003, Plaintiff Class filed its "Opposition to Defendants' Motion to Stay the Special Master's Investigation," arguing that Defendants had not met their burden to show that they were entitled to such a stay because, among others, they were unlikely to succeed on the merits because the Special Master's investigation was in accordance with the Special Master's order of reference,

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requested with respect to the third case, Appeal No. 03-1998, which remained separate.

[9] This document was later replaced by an amended version on 18 July 2003.

an order which had not been challenged, and because the requirements for interlocutory and mandamus jurisdiction were not met in this case. On 21 July 2003, the Court of Appeals for the First Circuit issued a judgment in which it dismissed the appeal before it for lack of jurisdiction and denied the petition for a writ of mandamus.[10] With respect to this appeal, Defendants' request for rehearing en banc was denied on 5 September 2003.

The Court then issued an order noting its apparent lack of jurisdiction over Defendants' other appeal[11] for the same reasons expressed in its 21 July 2003 order, and directed the Defendants to voluntarily dismiss the appeal or to show cause why the appeal should not be dismissed for lack of jurisdiction. Defendant responded by arguing that the appeal presented a new issue not encompassed in appellants' earlier appeal, an argument which was opposed by Plaintiffs. On 4 November 2003, the court of appeals, finding that no new issue was in fact presented, dismissed Appeal No. 03-1998 for the same reasons the earlier appeals had been dismissed.

Despite the alleged risk of irreparable harm to their interests, Defendants (hereinafter "Petitioners") did not file their Petition for Certiorari within the ninety-day period provided in this Court's Rules and, rather, requested additional time to file their petition which was eventually presented on 23 December 2003.

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[10] This order pertained to Appeal No. 03-1884 and the mandamus petition Case No. 03-1946. *See supra* note 8.

[11] Referring to Appeal No. 1998. *See supra* note 8.

REASONS THE PETITION FOR CERTIORARI SHOULD BE DENIED

In this case, Petitioners seek to challenge the activities of a Special Master during his investigation which included ex parte (meaning outside the presence of counsel) interviews and document exchanges between the Special Master and the Petitioners and their employees. At times throughout this process, Petitioners have expressed their concern with the process which will follow the Special Master's presentation of the results of his investigation. Of course, these harms are entirely speculative since the Court has not yet decided what it will do with the recently filed Special Master's Final Report. For the purpose of seeking interlocutory review, however, Petitioners argue that the very act of permitting these ex parte interviews and document exchanges, constituted a due process violation or was otherwise legally improper because it creates a danger that privileged information may be divulged outside the presence of counsel. This is the only coherent theory of harm described and argued by Petitioners. As detailed more fully below, the Petition for Certiorari should not be granted because a number of factors militate against the exercise of certiorari jurisdiction, and because the results reached below were correct.

I. Even Assuming That the Present Controversy Were Not Moot, this Court Should Not Consider the Question Presented Pertaining to the Propriety of the Special Master's Investigation since the Issue was Not Properly Preserved, Sufficiently Developed or Decided Below.

This Court does not generally address issues not decided or fully considered by the courts below. *See e.g.*,

Roberts v. Galen of Va., Inc., 525 U.S. 249, 253-254 (1999). While there can be no doubt that counsel for the Petitioners raised, *ad nauseum*, generalized claims that the Special Master's ex parte investigation violates notions of due process, the somewhat more recent theory that the legal impropriety of that investigation stems from the possibility that this process might endanger the confidentiality of privileged information was not litigated before the district court prior to presentation of the appeal(s) and the petition for mandamus.[12] It is important to point out that this particular argument (the potential threat to privileged information) was not developed below because the entire Petition for Certiorari now hinges on it. It is not only that Petitioners' first question presented is inextricably intertwined and completely dependent upon the idea that the ex parte communications have the potential to compromise privileged information, for otherwise, Petitioners have identified no immediate or legally cognizable harm stemming from such communications. It is also that Petitioners' argument that mandamus should have issued from the appellate court rests upon cases in other circuit court of appeals where mandamus issued because otherwise a privilege would be divulged and there would be no adequate remedy. (*See* Pet. for Cert. at 27.)

[12] The first mention of the issue is made in the Petition for Mandamus and Appellant's Brief on the Merits, dated 1 July 2003, presented to the First Circuit Court of Appeals. The first mention of the issue in the district court is in Petitioners' Motion Submitting Objections to Second Report of the Special Master, dated 3 November 2003. (App. at 167-179.) No ruling has been made by the district Court on that motion.

The argument relating to privileges was first mentioned to the district court as part of Petitioners' objections to one of the reports of the Special Master (on 3 November 2003). In that document, Petitioners made no attendant request for relief (other than to request that the master's recommendations not be adopted in the absence of a hearing), and the argument was neither responded to nor ruled upon. Moreover, the argument was never reached by the Court of Appeals at all since the case was dismissed for want of jurisdiction. The argument should, therefore, not be entertained by the Court.

II. The Court Should Not Exercise its Discretion to Grant Certiorari in the Present Case Because the Court of Appeals' Decision Is Not in Conflict with the Law of Other Circuits and the Allegedly Conflicting Decisions Noted by Petitioners Are Distinguishable on the Law and Facts.

Petitioners claim that the appellate court's refusal to exercise interlocutory or mandamus jurisdiction is in conflict with the law of other circuits. (Pet. for Cert. at 27.) The cases cited by in the Petition for Certiorari are distinguishable from the present case both on the law and on the facts.

The argument that the Special Master's investigation itself endangers the secrecy or privacy interests of Petitioners is purely speculative. In the present case, there has not even been the remotest suggestion on the part of Petitioners that upon being interviewed by the Special Master, a concerned Defendant made the request to consult with counsel prior to divulging information, but was threatened or otherwise coerced into giving up the

information. Rather, Petitioners' argument hypothesizes that if at some point in his investigation the Special Master requests information which was privileged, the interviewee or person compiling documents, either through error or inadvertence (since counsel was not present[13]), might respond by divulging privileged information. Fortuitous disclosures such as the one described could just as easily result from answering questions at a press conference, granting a television interview or discussing work with interested persons at a dinner party and, frankly, such innocuous waivers of technically privileged, but not terribly important information occur all the time with little or no attendant consequences.

This situation is readily distinguishable from the cases cited by Petitioners in their Petition for Certiorari. (*See* Pet. for Cert. at 27.) None of the cases cited by Petitioners concern situations in which the mere *possibility* that privileged information *might* be requested, and then *perhaps* revealed, warranted the granting of mandamus relief. Rather, in the cited cases mandamus is entertained to address distinct district court orders directing the disclosure of particular information, communications or documents claimed to be protected by specific and identified privileges where the district court had evaluated and rejected the claims of privilege for various and sundry reasons. *In re Von Bulow*, 828 F.2d 94 (2nd Cir. 1987) (mandamus issued to review an order granting plaintiff the right to discover the contents of certain conversations

[13] The fact that Defendant can meet with counsel prior to and after the interview with the Special Master is apparently not something that has occurred to opposing counsel.

between petitioner-defendant and his attorneys); *In re Burlington Northern, Inc.*, 822 F.2d 518 (5th Cir. 1987) (mandamus issued to review an order compelling production of specific documents allegedly protected by attorney client privilege and work product privilege) *cert. denied*, 484 U.S. 1007 (1988); *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486 (9th Cir. 1989) (mandamus issued to review an order compelling production of statements by two senior company officials gathered by counsel in anticipation of litigation); *Barclays American Corp. v. Kane*, 746 F.2d 653 (10th Cir. 1984) (mandamus *denied* to review district court's order compelling production of some of the documents identified in a privilege log which were found not to be privileged)[14]; *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970) (mandamus issued to reverse district court order to compel production of counsel's debriefing memoranda of particular employees since they were protected by work product privilege).

In those cases the revelation of allegedly protected information is certain, specific, palpable and imminent, thus supporting the allegation of a need for prompt and extraordinary relief, whereas in the present case the revelation of protected information is abstract and improbable. The purported "conflict in authority," is therefore nonexistent.

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[14] It should be noted that the Petition for Certiorari falsely asserts that this case supports the proposition that mandamus should have been issued.

III. The Court Should Not Exercise its Discretion to Grant Certiorari in the Present Case Because the Issues Presented by the Petitioner Are Not Compelling or Important Enough to Warrant Review.

As already discussed, Petitioners argue that the very act of permitting interviews and document exchanges outside the presence of counsel between the Special Master and the Petitioners and their employees, in and of itself, constitutes a due process violation because of the threat that privileged information may be divulged. Nevertheless, throughout this process this supposed threat has remained purely theoretical. No claim has ever been made that the Special Master actually sought to acquire privileged information, nor are there any specific, concrete examples of privileged information being requested or handed over to the Special Master. Moreover, as indicated below in part V of this document, ex parte communications between the special masters and parties are permitted in some circumstances and were appropriate in this case. Assuming good faith, rather than any intentional attempt to conceal, it appears that opposing counsels' primary concern is their own inability to monitor, respond to and control the Special Master's investigation.

Petitioners do not paint a picture of a district court so wildly out of control as to require this Court's censure or rectification. To the contrary, there are no federal rules, no statutory provisions and few judicial standards that address situations such as those confronted by the district court. Given what the district court perceived as a very real potential for further deterioration of conditions at the Hospital and the resultant harm to the Plaintiff Class, and clearly moved by a sense of duty based on its twenty-eight

year involvement with the Hospital, the lower court developed an expeditious and artful strategy for addressing the problems it perceived, as a better alternative to mobilizing its contempt powers or other more traditional approaches[15] which would not likely have been as efficacious and responsive to the needs immediately at hand.

Nor is it probable that the resolution of the questions presented here would be capable of providing guidance to any wide class of litigants in other cases. The special and particular circumstances surrounding the appointment of the Special Master in this case, coming as it does after the finalization of twenty-eight years of institutional reform litigation at a time of sudden and unexpected institutional crisis, make the legal issues raised by Petitioners rather unique.

IV. The Decision below Was Correct Because the Circuit Court of Appeals Did Not Have Interlocutory Jurisdiction over the Issues Raised on Appeal and Did Not Abuse its Discretion in Declining to Review Those Issues Pursuant to its Mandamus Power.

Generally speaking, district court orders or decisions appointing or giving procedural direction to a special master are non-appealable. *Deckert v. Independence Shares Corp.*, 311 U.S. 282 (1940); *see also Morales Feliciano v. Rullan*, 303 F.3d 1, 10 (1st Cir. 2002). Nonetheless,

[15] The Court could have, for example, directed Plaintiffs to conduct discovery and file a motion for contempt, a litigation process which would doubtless have been more sluggish in addressing the problems existing at the Hospital.

Petitioners predicate jurisdiction in their case before the Court of Appeals upon the collateral order doctrine and the appellate court's power to issue a writ of mandamus.

The collateral order doctrine was first described in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949):

> Section 1292 allows appeals also from certain interlocutory orders, decrees and judgments, not material to this case except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties. It is obvious that, if Congress had allowed appeals only from those final judgments which terminate an action, this order would not be appealable.
>
> The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. . . .
>
> Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.

Id. at 545-6. One of the most common examples of the application of the *Cohen* doctrine occurs where official immunity is denied based purely on a question of law, giving place to interlocutory review because appeal after

trial cannot effectively protect against the burdens of trial. *E.g.*, *Mitchell v. Forsyth*, 472 U.S. 511 (1985).

It should be remembered that the collateral order doctrine is an extremely narrow exception. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985). To meet the *Cohen* exception an order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). It is important to recall that, even where the order conclusively determines the disputed question and resolves an issue separate from the merits, the claim of harm, if insufficiently serious, will not trigger the collateral order doctrine. In this sense, the issue must be "important" and work some real and irreparable hardship upon the party claiming appellate jurisdiction, such that the issue is rendered "unreviewable," if not immediately heard. *Id.*; *see also Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949) (The doctrine allows appeal "from orders other than final judgments when they have a final and irreparable effect on the rights of the parties."). Thus, it is important to keep in mind that application of the collateral order doctrine has been denied even where a failure to review may lead to some prejudice. For example, in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), this Court held that a district court order denying class certification did not give rise to a right to appeal under the collateral order doctrine. Likewise, in *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368 (1981), this Court ruled that the collateral order exception did not apply to a district court's denial of a motion to disqualify an attorney

for conflict of interests, because effective review could be had on appeal from the final judgment.

In the present case, these requirements for application of the collateral order doctrine are not fulfilled. The district court has not conclusively determined the disputed question because it has not yet determined what use, if any, will be given to the Special Master's reports. And although the Special Master's charge, in general terms, is separable from the merits of the action, the question of how his investigation is conducted is not separable from his commission in general and the manner in which his reports are ultimately used by the district court, a process which has yet to be completed.

Finally, there is no reason to credit the assertion that, if not addressed at this time, review will be impossible. If the district court acts upon the Special Master's report to issue a final judgment which prejudices Petitioners, they would, at that time, be able to challenge that action by raising their objections to the manner in which the Special Master's investigation was carried out.

Moreover, in this case, to the extent that the order sought to be reviewed is so closely tied to the particular circumstances of this specific scenario, it would be inappropriate to apply the collateral order exception here. *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 206 (1999) ("[W]e have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral."); *see also U.S. v. Quintana Aguayo*, 235 F.3d 682, 685 (1st Cir. 2000) ("Appealability must be decided for classes of orders, ignoring injustices peculiar to the case at hand").

Unlike the cases in which specific and particularized information is ordered to be divulged over claims of

privilege or secrecy, *e.g.*, *Irons v. Federal Bureau of Investigation*, 811 F.2d 681, 683 (1st Cir. 1987) (reviewing an order to produce documents identifying informants because denial of appeal "would be to force the government to let the cat out of the bag, without any effective way of recapturing it if the District Court's directive was ultimately found to be erroneous."), the privilege argument here is purely speculative if not completely trumped up as a justification for appellate review. As mentioned above, there are no concrete examples of privileged or otherwise protected information being compromised and Petitioners' argument that the absence of counsel during the Special Master's interviews and compiling of documents *may* cause protected information to be revealed is both speculative and highly unlikely. It would be histrionic, therefore, to consider that the potential harm to Petitioners is so great as to require the extraordinary measure of interlocutory review.

For these same reasons, exercise of mandamus jurisdiction by the First Circuit Court of Appeals would not have been proper in this case. It is most important to remember that issuance of the writ of mandamus is in large part a matter of discretion with the court to which the petition is addressed. *Schlagenhauf v. Holder*, 379 U.S. 104, 112 n. 8 (1964). Supervisory control of the district courts through mandamus is appropriate when there has been a "clear abuse of discretion," a "usurpation of judicial power," or an "abdication of the judicial function." *Schlagenhauf v. Holder*, 379 U.S. 104 (1964); *La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957).

Mandamus is an extraordinary and "drastic" remedy, *Kerr v. United States District Court*, 426 U.S. 394, 402 (1976), that is justified only by "exceptional circumstances

amounting to a judicial 'usurpation of power,'" *Will v. United States*, 389 U.S. 90, 95 (1967). A consideration of the factors which would normally weigh in favor of an exercise of mandamus jurisdiction demonstrates that the appellate court's decision to deny the petition for mandamus was well within its discretion. *Bauman v. United States District Court*, 557 F.2d 650, 654-655 (9th Cir. 1977) ("(1) the party seeking the writ has no other adequate means, such as a direct appeal, to attain the relief he or she desires. . . . (2) The petitioner will be damaged or prejudiced in a way not correctable on appeal. (This guideline is closely related to the first.) . . . (3) The district court's order is clearly erroneous as a matter of law. . . . (4) The district court's order is an oft-repeated error, or manifests a persistent disregard of the federal rules. . . . (5) The district court's order raises new and important problems, or issues of law of first impression.").

In fact, in one of the cases cited by Petitioners, the Seventh Circuit Court of Appeals denied the petition for mandamus explaining that, even acknowledging the potential irreparable harm that might come from the disclosure of information alleged to be protected by privilege, mandamus jurisdiction was not proper. *Barclays American Corp. v. Kane*, 746 F.2d 653, 654-6 (10th Cir. 1984). Petitioners also cite a number of cases in which mandamus issued to review orders requiring disclosure of particular information alleged to be privileged. As discussed above, those cases are distinguishable from the case at hand. A much more apposite case is *Kerr v. United States Dist. Court for Northern Dist.*, 426 U.S. 394 (1976). In that case, the plaintiffs requested discovery of documents alleged by the defendants to be confidential based on common law governmental privileges. In ruling on the

plaintiffs' motion to compel, the district court ordered disclosure and the defendants sought a writ of mandamus which was rejected by the appellate court. On certiorari, this Court rejected the use of mandamus in the face of general and non-particularized claims of privilege. *Id.*

Petitioners claim that they will suffer irreparable harm if the Special Master's investigation is not stopped. With respect to the claims that the Special Master's investigation potentially threatens the confidentiality of privileged information, Petitioners' argument is a ghost, which is neither an inescapable nor a logical consequence of the type of investigation being carried out, and which is wholly unsubstantiated by the facts. Moreover, at this time the Special Master's reports have not been acted upon by the district court, and unless and until that occurs, it is tomfoolery to claim any harm. The district court has not stated that it plans to issue injunctive relief, award damages or rule Petitioners in contempt, much less based only on the Special Master's investigation without any further proceedings or hearings on the matter. In fact, the Court has specifically indicated that "[o]nce the special master concludes his investigation and files a complete report, the Court will afford the parties the opportunity to file objections to the Special Master's report and hold an evidentiary hearing if warranted." The appellate court was, therefore, correct to dismiss the appeal and deny the petition for mandamus.

V. Even Assuming That this Court Had Jurisdiction and Chose to Address this Case on the Merits, the Result below Would Still Be Correct Because a Special Master Has Discretion to Conduct Informal Investigations So Long as the Parties Are Given an Opportunity to Object to the Results of His Investigation and Allowed to Present Evidence in Support of Their Position.

Petitioners argue that the participation of counsel at the Special Master's interviews[16] and requests for production of documents is legally required because these interviews may have touched upon privileged matters and, without counsel's presence, there is no way of avoiding the privileged information from being divulged or knowing whether or what kind of privileged information has in fact been gathered by the Special Master. Why counsel for Petitioners has such poor communication with his clients that he was unable to advise them with respect to their potential privileges or debrief them with respect to what information was transmitted to the Special Master is not discussed.[17]

It should be remembered that the order reappointing the Special Master in this case was in response to certain

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[16] It is also important to note that the Special Master has conducted interviews of persons who are not defendants in the case with respect to whom Petitioners cannot make arguments of protecting privileged information.

[17] A potentially troubling suggestion made by the Special Master is that the Secretary of Health has been significantly more disposed to cooperating with the Special Master than the documents presented by his legal representative suggest. Plaintiffs, however, cannot claim to know any more than what is contained in the documents filed by the Special Master.

public and private information drawn to the attention of the district court, suggesting that its orders were not being complied with. District Courts have a continuing duty to ensure that their orders are respected. This is especially so in a case such as this concerning constitutional rights and institutional reform, where the protracted (approximately 28 years of litigation from 1974 until 2002) and exhausting work that has been accomplished suddenly seems to be at the point of unraveling.[18] Under such circumstances, a district court can and should have authority to carry out an investigation, including ex parte communications between a special master and the parties, if it believes that such are necessary and desirable in ensuring the preservation of progress made in ensuring adherence to constitutional standards. It should be noted that the Special Master's investigation has not involved the use of his subpoena power nor have any of the persons interviewed been placed under oath. Rather, in accordance with the practice that has generally been utilized in this case, the proceedings have been informal and flexible.

Although Petitioners make much ado of the limitations allegedly imposed upon the work of Special Masters, recent amendments to Rule 53 make plain that ex parte communications between special masters and parties may be legitimately carried out as part of a special master's

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[18] All those involved in this case know only too well how difficult it is to attempt to correct institutional problems once an institution is in a state of crisis. It is hoped that the rapid assistance of the district court through the Special Master's quick intervention may help address the Hospital's problems before they spiral out of control.

enterprise. See Fed. R. Civ. P. 53(b)(2)(B).[19] Given that such communications are contemplated in the figure of the Special Master, and the district court's perception of the need to take swift and effective action in the case, the district court did not abuse its discretion in authorizing the type of investigation of which Petitioners complain. Thus, even assuming that this court chose to address this case on the merits, the result below would still be correct.

CONCLUSION

For the forgoing reasons, respondent asks that the Court deny the Petition for Certiorari.

Dated: San Juan, Puerto Rico, 2nd of February 2004.

Respectfully submitted,

CARLOS V. GARCÍA GUTIÉRREZ
ALEJANDRA BIRD LÓPEZ

[19] It should be noted that this portion of the rule, which provides that the order appointing the special master must state, "the circumstances . . . in which the master may communicate ex parte with the court or a party," was not in effect until after the order appointing the Special Master in this case was issued.